No. _____ (1)

Supreme Court, U.S.
F I L E D

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IN THE

Supreme Court of the United States

OFFICE OF THE CLERK

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Lawrence A. Blatte
Counsel of Record
James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran

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QUESTION PRESENTED

Whether it was just and practicable for the United States Court of Appeals for the Ninth Circuit to retroactively apply amended Bankruptcy Rule 7004(f) to the underlying adversary proceeding to find personal jurisdiction over the Petitioners, non-residents who would not otherwise be subject to personal jurisdiction, when the amendments took effect after the applicable statutes of limitations for the underlying claims for relief had run, nearly two years after the Petitioners' motion to dismiss, nearly three years after the commencement of the adversary proceeding and over five years after the purported jurisdictional events took place?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran who were defendants-appellants in the Court of Appeals.

Respondents are Bernard Goodson, Ford Elsaessar, Lowell Finley and Jay J. Miller who were plaintiffs-appellees in the Court of Appeals. Respondents are the trustees of a litigation trust formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, the reorganized debtors.

Inoco Plc, a United Kingdom corporation now known as Inoco Limited, was also a party (defendant-appellant) to the Ninth Circuit appeal. Inoco Limited's parent company is Lawgra, Plc; it has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Petitioners") respectfully request that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed

November 3, 1997 and amended January 14, 1998 in this matter.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit is officially reported at 133 F.3d 1141 (9th Cir. 1998), and is reproduced in the Appendix at A 1a-14a.[1] The opinion of the United States District Court for the District of Idaho is not reported, and is reproduced at A 34a-57a. The opinion of the United States Bankruptcy Court for the District of Idaho is not reported, and is reproduced at A 79a-168a.

STATEMENT OF JURISDICTION

The opinion and order of the Court of Appeals was filed on November 3, 1997 and, after rehearing, amended on January 14, 1998 (A 1a-14a). The jurisdiction of this Court to review the opinion and order of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the Court of Appeals' erroneous retroactive application of amended Bankruptcy Rule 7004 to the underlying adversary proceeding. The former Bankruptcy Rule 7004, in effect through November 30, 1996, is set forth at A 169a-173a. The revised Bankruptcy Rule 7004 is set forth at A 174a-178a.

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[1] References preceded by "A" refer to pages in the Appendix accompanying this Petition.

STATEMENT OF THE CASE

A. Introduction

Petitioners are foreign residents and citizens with almost no contact with the State of Idaho. Nevertheless, they have been sued in the United States Bankruptcy Court for the District of Idaho in connection with alleged wrongs which, again, were not committed in Idaho. Ever since the commencement of the adversary proceeding against them and others in 1994, Petitioners have been contesting jurisdiction. No doubt recognizing that both the Bankruptcy Court and the District Court erred in finding that sufficient facts had been stated by Respondents to withstand a motion to dismiss for lack of personal jurisdiction based on Idaho's long-arm statute, the United States Court of Appeals for the Ninth Circuit did not address this basis for the lower courts' findings. Instead, the Ninth Circuit retroactively applied a new amendment to Bankruptcy Rule 7004, which confers jurisdiction over non-resident defendants so long as the exercise of jurisdiction is consistent with the Constitution. Rule 7004(f) provides:

> (f) *Personal Jurisdiction*. If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f) (A 177a-178a). Accordingly, the Ninth Circuit held that, if properly served personal jurisdiction can be asserted over such defendants by any bankruptcy court, so long as they had contacts with the United States. Thus, the Ninth Circuit has effectively created jurisdiction over the Petitioners where none previously existed, long after the predicate

acts conferring jurisdiction occurred, and long after the applicable statutes of limitations for the various claims for relief alleged against Petitioners have expired, thereby significantly impacting upon the Petitioners' rights, liabilities and remedies.

Under the circumstances, the Ninth Circuit should be reversed and the Amended Complaint dismissed against Petitioners. At the very least, the matter ought to be remanded for a hearing to determine whether the retroactive application of amended Bankruptcy Rule 7004 was just or practicable in this case.

B. Procedural History

The Petitioners, former officers and directors of Gulf USA Corporation ("Gulf"), a Delaware corporation that was headquartered in Boston throughout the Petitioners' tenure, are citizens and/or residents of the United Kingdom with few, if any, relevant contacts with Idaho. Several years after Petitioners left Gulf, involuntary bankruptcy proceedings against Gulf and a subsidiary, Pintlar Corporation ("Pintlar"), were commenced in the Idaho Bankruptcy Court. It is undisputed that Gulf met its financial obligations throughout the Petitioners' tenure as officers and directors.

Gulf then commenced an adversary proceeding in the Idaho Bankruptcy Court against the former management of Gulf, including the Petitioners, and others who allegedly acted in concert with them to recover damages from supposed waste or diversion of Gulf's assets.[2] Respondents alleged that the Petitioners controlled Gulf during their tenure as officers and directors, but it is undisputed that pursuant to the "Standstill

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[2] An amended complaint named Gulf, Pintlar and H.P. Harbert, as trustee of a litigation trust for the benefit of Gulf and Pintlar's creditors, as plaintiffs; and on January 25, 1996, Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as trustees of the litigation trust, replaced Gulf, Pintlar and Harbert as plaintiffs. Goodson, Elsaesser, Finley and Miller will hereinafter be referred to as Respondents (A 62a-65a).

Agreement" at least half of Gulf's directors were required at all times to be independent directors unrelated to the Petitioners. Thus, the Petitioners on their own could not have directed Gulf to engage in the transactions of which Respondents complain.[3] And, Respondents have presented no proof to date that any of the transactions in question were improper.

On or about January 31, 1995, the Petitioners and other defendants moved to dismiss for lack of personal jurisdiction and insufficient process and service of process. The motion was heard on June 30, 1995. The Bankruptcy Court dismissed the claims against the Petitioners for corporate waste and mismanagement. The Bankruptcy Court concluded, however, that Respondents had stated sufficient facts in the complaint which, if proven, would subject the Petitioners to jurisdiction in Idaho for Respondents' remaining claims under the Idaho long-arm statute and under the conspiracy theory of personal jurisdiction (A 79a-168a).[4]

On or about December 11, 1995, the Petitioners were granted leave to appeal, and Respondents were granted leave to cross-appeal, to the Idaho District Court (A 66a-68a). The District Court held that there was no jurisdiction over

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[3] The Petitioners could not approve related party transactions without the approval of two-thirds of the board of directors. Indeed, the transactions at issue in this proceeding were unanimously approved by Gulf's board of directors, including the independent directors.

[4] Although Gulf met its financial obligations throughout the Petitioners' tenure as officers and directors, Respondents nonetheless claimed that jurisdiction in Idaho was proper over the Petitioners because Rowland, acting solely in his capacity as Gulf's chairman, misrepresented to creditors in Idaho the directors' intention to meet Gulf's financial obligations. Respondents also claimed that Petitioners controlled Gulf despite the fact that at least half of the members of Gulf's board of directors were independent directors unrelated to the Petitioners. These erroneous allegations by Respondents were relied on by the courts below in finding that Respondents had stated sufficient facts, which if proven, would subject the Petitioners to jurisdiction in Idaho.

Petitioners for claims of breach of contract. The District Court also held, on grounds different than those relied upon by the Bankruptcy Court, that the Respondents had stated facts which, if proven, would subject Petitioners to jurisdiction in Idaho under the Idaho long-arm statute for all of Respondents' other claims (including corporate waste and mismanagement) (A 34a-57a). The interlocutory appeal was considered on submission only.

Both the Bankruptcy Court and the District Court agreed that jurisdiction over the Petitioners could be based only on the Idaho long-arm statute, and that no federal statute or rule, including the version of Rule 4 of the Federal Rules of Civil Procedure incorporated by the Bankruptcy Rules in effect at the time, subjected the Petitioners to jurisdiction. At the time of the decisions below, Bankruptcy Rule 7004 incorporated the version of Rule 4 in effect on January 1, 1990, notwithstanding any subsequent amendments to Rule 4 (A 172a).

By application dated September 25, 1996, the Petitioners sought, and on October 11, 1996 were granted, leave to appeal to the Ninth Circuit Court of Appeals from the District Court's decision of the jurisdictional motion (A 27a-28a). Oral argument of the Petitioners' appeal was heard by the Court of Appeals. The Court of Appeals' opinion was filed on November 3, 1997 (A 15a-26a) and, after rehearing, amended on January 14, 1998 (A 1a-14a).

On December 1, 1996, after the Court of Appeals granted Petitioners leave to appeal, amendments to Bankruptcy Rule 7004 became effective (A 181a). Amended Bankruptcy Rule 7004 deleted the old Bankruptcy Rule's incorporation of the version of Rule 4 that was in effect on January 1, 1990, and instead incorporated the current version of Rule 4 of the Federal Rules of Civil Procedure. The amendments to Bankruptcy Rule 7004 became effective nearly two years after the Petitioners' motion to dismiss, nearly three years after the commencement of this litigation, long after the purported

jurisdictional events and after the applicable statutes of limitations had expired for all of the claims for relief against Petitioners. The Ninth Circuit Court of Appeals affirmed the lower courts' denials of Petitioners' motion to dismiss for lack of personal jurisdiction by retroactively applying Bankruptcy Rule 7004(f), ignoring the lower courts' reliance upon the Idaho long-arm statute as the basis for personal jurisdiction.

C. Factual Background

Gulf is a Delaware corporation (A 85a). Petitioners were directors and/or officers of Gulf between 1989 and 1991 (A 84a). Prior to Petitioners' tenure as officers and directors of Gulf, Gulf conducted a number of businesses through subsidiaries. Gulf's former subsidiary, Bunker Hill Company ("Bunker Hill"), was involved in mining and smelting activities in Idaho, which activities ceased many years before 1989 (A 85a). In 1989, Downshire, N.V., a Netherlands Antilles company and subsidiary of Inoco, an English company, acquired 34% of Gulf's stock (A 86a). Petitioners, who were officers and/or directors of Inoco, were elected officers and/or directors of Gulf. When Petitioners became officers and/or directors of Gulf in 1989, the company's primary businesses consisted of oil and gas operations in Texas and Louisiana and coal operations in Pennsylvania.

In 1991, Downshire sold its Gulf stock to Nycal Corporation pursuant to a Stock Purchase Agreement (the "SPA") and Petitioners were replaced as officers and directors of Gulf (A 99a). The SPA was negotiated in the United Kingdom and called for a United Kingdom closing. After the closing, litigation arose in the United Kingdom out of the sale. The litigation was settled pursuant to three primary agreements, all dated October 4, 1991: (1) an agreement between Nycal, Inoco and Downshire; (2) an agreement between Inoco and Gulf; and (3) an agreement between City Realties Limited (Gulf's New Zealand subsidiary) and Inoco. Pursuant to these

agreements, Nycal, Gulf and City Realties released Inoco and the Petitioners from all claims which any of the corporations had against Inoco or the Petitioners (A 100a). The releases given by Gulf and its subsidiary were negotiated in England and are expressly governed by English law.[5]

Gulf was headquartered in Boston, Massachusetts throughout the Petitioners' tenure (A 85a). The succeeding management relocated Gulf's headquarters to Washington, D.C. (A 85a). Gulf's headquarters moved to Kellogg, Idaho sometime *after* the commencement of this action (A 85a). Gulf was not qualified to do business in Idaho when the Petitioners served as officers and directors of Gulf.

In 1992, after Petitioners ceased to be officers and directors of Gulf, Pintlar reacquired some of Bunker Hill's assets as a consequence of the bankruptcy of Bunker Hill Limited Partnership (A 85a-86a). The Bunker Hill site had become the subject of an environmental cleanup action in the early 1980's, prior to its reacquisition by Pintlar; alleged environmental liabilities were significant (A 86a). Thereafter, on October 18, 1993, an involuntary bankruptcy petition was filed against Pintlar in the Bankruptcy Court. An involuntary bankruptcy petition was filed against Gulf in the same court minutes after the petition was filed against Pintlar (A 39a). Significantly, Idaho venue for the Gulf case was premised not on Gulf's presence in Idaho, but, in part, on the pendency of the bankruptcy case against Pintlar in Idaho. Gulf initially contested the propriety of venue in Idaho and filed a voluntary bankruptcy petition in Delaware. Ultimately, Gulf consented to bankruptcy relief in Idaho pursuant to stipulations negotiated with the petitioning creditors.

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[5] The validity of the releases has been upheld by the United States District Court for the Southern District of New York. *See Nycal Corp. v. Inoco, Plc*, No. 96 Civ. 7159, 1997 U.S. Dist. LEXIS 19851 (S.D.N.Y. Dec. 15, 1997). The validity of the releases is also the subject of an action brought by the Petitioners and others against Gulf and others in England, which action has been stayed by the U.K. court.

The underlying adversary proceeding was commenced on January 27, 1994. Venue was based, not on the location of the defendants or the transactions at issue, but on the pendency of the bankruptcy proceeding against Gulf. An Amended Complaint asserting claims against the Petitioners and 28 other defendants was filed on November 30, 1994. The Amended Complaint contains a laundry list of charges against the former management of Gulf and others who allegedly acted in concert with them to recover damages for supposed waste or diversion of the company's assets. The claims against Gulf's former officers and directors, including the Petitioners, include theories of fraud, misrepresentation, breach of contract, breach of fiduciary duty, fraudulent conveyance, negligence and corporate waste. Respondents also claim that the releases given to the Petitioners by Gulf are void.

The damages attributed to the Petitioners in the Amended Complaint allegedly arose from several investments and commercial transactions which the Petitioners directed Gulf[6] or its subsidiaries (other than Pintlar) to engage in. Respondents have yet to provide a shred of evidence that any of these transactions was in any way improper. Many of these commercial transactions occurred overseas; none occurred in Idaho or involved Idaho residents or entities. These transactions include:

- the allegedly wasteful leasing of office space, equipment or motor vehicles in London or Monaco (A 89a);
- the purchase by Gulf of shares of stock of Storehouse Plc, a British retailer, over the London Stock

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[6] The transactions at issue were unanimously approved by Gulf's board of directors, including the independent directors who composed at least half of the board. The Petitioners on their own could not have directed Gulf to engage in the transactions of which Respondents complain as any related party transactions required the approval of two-thirds of the board of directors.

Exchange at an allegedly inflated price on August 29, 1989 (A 88a-89a);

- the purchase of various New Zealand properties by Gulf and one of its New Zealand subsidiaries (De Valdor) between September 1989 and early 1990 pursuant to which some defendants allegedly obtained improper fees (A 91a-93a);
- the allegedly improper merger of Gulf's New Zealand subsidiary (De Valdor) with a New Zealand company (City Realties Limited) in New Zealand between December 1989 and March 1990 (A 93a-94a);
- Gulf's allegedly improvident purchase in the U.K. of shares in a Texas corporation (Aviva Petroleum) traded on the International Stock Exchange (A 96a-97a);
- the purchase of property located in Kidderminster, England by an English subsidiary (Neldran Ltd.) of Gulf's New Zealand subsidiary (City Realties Limited) at an allegedly inflated price from a Panamanian company (A 97a-98a);
- the allegedly manipulative securities transactions made by Sexton Ltd., a British Virgin Islands subsidiary of Gulf, through an Anglo-Danish brokerage house (A 88a);
- the allegedly negligent investment by an English subsidiary (Lawgra (No. 76) Ltd.) of Gulf in the recovery of cargo from a sunken ship in the Gulf of Oman (A 98a); and
- the allegedly negligent real estate transactions by Gulf in Houston and New York City (A 89a, 94a-95a).

All of these transactions took place during 1989-1991. As the longest applicable statute of limitations for any of the claims

for relief asserted in the Amended Complaint is five years, it is clear that by December 1, 1996, the date that the amended bankruptcy rules took effect, each of the claims for relief would have been barred by the relevant statute of limitations.[7]

At all relevant times, Rowland, James and Hudd were citizens of the U.K. and Moran was a citizen of Canada. At all relevant times, James, Hudd and Moran were residents of the U.K., and Rowland was a resident of Monaco (A 36a). The Petitioners own no property, and conduct no substantial or continuing activities, in Idaho or the U.S. (A 115a). Throughout their tenure at Gulf, the Petitioners continued to reside abroad. None of the Petitioners has ever been a resident or citizen of Idaho or the U.S. Although the Petitioners infrequently traveled to the U.S. for meetings of Gulf's board of directors or stockholders, none of these meetings was ever held in Idaho while they were with the company.[8] The Petitioners had little, if any, contact with Idaho, and those few contacts with Idaho were extremely sporadic: Moran was

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[7] Count I is governed by 11 U.S.C. § 546(a) (earlier of (1) the later of (a) two years after order for relief or (b) one year after appointment of the first trustee and (2) the time the case is closed or dismissed). Count II, for breach of fiduciary duties, corporate waste and mismanagement is governed by I.C. § 5-217 and I.C. § 5-224 and has a statute of limitations of four years. Count III, for misrepresentation is governed by I.C. § 5-218(4) and has a statute of limitations of three years. There is no statute, nor any case law, creating a separate cause of action, let alone a statute of limitations for Counts IV and V, seeking damages for aiding and abetting and civil conspiracy. Count VI, breach of the Standstill Agreement, is governed by I.C. § 5-216 and has a statute of limitations of five years. Count VII, seeking damages for violation of Delaware General Corporation Law Section 160 has a statute of limitations of three years. Count VIII seeks to toll all statute of limitations due to fraud which is governed by a statute of limitations of three years. Count IX seeks to avoid the releases on account of fraud and is likely governed by I.C. §5-218(4) and has a statute of limitations of three years.

[8] The primary board meeting about which Respondents complain did not even occur in the United States but in Cap Ferat, France.

never present in Idaho (A 121a); James was in Idaho only once to discuss environmental issues (A 121a); Hudd was in Idaho only a few times to discuss environmental issues; and jurisdiction over Rowland is premised solely on a letter he signed addressed to certain creditors of Gulf (A 118a). The Petitioners never met directly with any creditors in Idaho.

In lieu of an answer, the Petitioners moved to dismiss the amended complaint for lack of personal jurisdiction and insufficient process and service of process. The decisions below were based solely on affidavits and pleadings, and, as is appropriate in considering a motion to dismiss the complaint, the courts below viewed the disputed allegations in a light most favorable to Respondents. Petitioners were not subject to general jurisdiction since they did not conduct substantial or ongoing activities in Idaho. The Bankruptcy Court first examined whether the assertion of personal jurisdiction over the Petitioners was valid under the Idaho long-arm statute, I.C. § 5-514(b) (commission of a tort within the State of Idaho). The Bankruptcy Court concluded that the claims against the Petitioners for corporate waste and mismanagement did not involve Idaho activities or injury and that the Petitioners were not amenable to service on these claims. The Bankruptcy Court found, however, that Respondents had sufficiently stated that Rowland and Hudd had each made a misrepresentation directed at creditors in Idaho because creditors were induced not to take steps to stop Rowland's and Hudd's activities, and that Rowland and Hudd were therefore subject to jurisdiction under the Idaho long-arm statute for all claims other than corporate waste and mismanagement (A 118a-121a).

In finding that sufficient facts had been pleaded to find Rowland subject to jurisdiction under the long-arm statute, the Bankruptcy Court relied entirely on a brief letter dated September 17, 1990 signed by Rowland, in his capacity as President of Gulf, to retirees of Gulf's former subsidiary Bunker Hill (A 118a). The letter merely explains Gulf's

general purpose in making various investments in the U.S. and abroad and Gulf's goal to meet its obligations to the retirees.[9] Respondents contend that the investments were really a sinister attempt to divert Gulf's assets and that the letter must therefore be considered false. The Bankruptcy Court, for purposes of the motion, treated the allegation that the letter contained a false statement as if it was true.

In finding that sufficient facts had been pleaded to find Hudd subject to jurisdiction under the long-arm statute, the Bankruptcy Court relied solely on a conference purportedly attended by Hudd on February 5, 1991 in Idaho during which he allegedly assured the Governor of Idaho that the commercial transactions were not intended to avoid or defraud Gulf's creditors (A 118a). Hudd specifically denied attending any such conference. The allegation that Hudd attended the conference was contained only in an affidavit of H.P. Harbert, former president of Pintlar. Shortly after the Bankruptcy Court decision, Harbert admitted that Hudd had not attended the conference and recanted his allegation that Hudd had been in Idaho at the time of the meeting (A 38a-39a n.6).

The Bankruptcy Court found that James and Moran had no direct jurisdictional contact with Idaho. The Bankruptcy Court nevertheless concluded that the Idaho Supreme Court would adopt the conspiracy theory of jurisdiction when construing the Idaho long-arm statute (A 121a-122a).[10]

The Bankruptcy Court held that isolated alleged misrepresentations by Rowland and Hudd subjected all of the Petitioners to jurisdiction under the Idaho long-arm statute not just for misrepresentation, but for all of Respondents' claims other than corporate waste and mismanagement (A 118a-

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[9] The letter was prepared by, and at the suggestion of, Gulf's outside counsel and was approved by Gulf's general counsel. Importantly the letter was written *after* many of the transactions identified above.

[10] Each of the Petitioners has explicitly and emphatically denied participating in any conspiracy.

122a). The Bankruptcy Court ignored Petitioners' argument that the Respondents lack standing or subject matter jurisdiction to bring the misrepresentation claim, thus destroying the only jurisdictional nexus with Idaho.

The Bankruptcy Court then considered whether the assertion of jurisdiction over the Petitioners comported with due process. The Bankruptcy Court looked to the Petitioners' contacts with the United States as a whole, rather than to their contacts with the forum state of Idaho (A 134a). It found sufficient national contacts largely on the strength of evidence that Respondents had participated in board of directors' meetings in states other than Idaho (A 138a).

The District Court held that the assertion of jurisdiction is proper under the Idaho long-arm statute whenever due process is satisfied (A 41a). The District Court did not separately examine whether the assertion of jurisdiction was proper under the Idaho long-arm statute. In conducting the due process analysis, the District Court correctly rejected the national contacts analysis applied by the Bankruptcy Court and held that Idaho was the relevant forum (A 44a-48a). The District Court then turned to the first prong of the due process test: whether the Petitioners had purposefully availed themselves of the forum of Idaho. The District Court found that the Petitioners' alleged contacts with Idaho were unrelated to the breach of contract claim (which was based on a purported violation of the Standstill Agreement between Gulf, Inoco, Downshire and the Petitioners), and it dismissed that claim (A 48a-52a).

The District Court found that Rowland had purposefully availed himself of the forum of Idaho based on the September 17, 1990 letter and that the alleged misrepresentation in the letter subjected Rowland to personal jurisdiction in Idaho for all of Respondents' other claims (A 49a). The District Court acknowledged Harbert's recantation of his claim that Hudd and the Governor of Idaho met in Idaho, which formed the

basis of the Bankruptcy Court's assertion of personal jurisdiction over Hudd (A 38a-39a n.6). Despite the fact that Harbert's veracity had been seriously called into question, the District Court nonetheless credited additional allegations made by him that Hudd had made misrepresentations at a few other meetings, all of which related to environmental issues, with Harbert in Idaho.[11] The District Court held that this was sufficient to find that Hudd had availed himself of Idaho for all of Respondents' claims except breach of contract (A 50a-51a).

The District Court rejected, as a matter of law, the Bankruptcy Court's determination that James had no relevant contacts with Idaho. Instead, the District Court credited Harbert's allegation that James attended a single meeting with Harbert in Idaho on February 21, 1991 relating to environmental issues at which James allegedly made a false statement concerning Gulf's commitment to address environmental issues. James denied making the purported misrepresentation, but the District Court found the allegation sufficient, for purposes of this motion, to assert personal jurisdiction over James in Idaho for all of Respondents' claims except breach of contract (A 51a).

The District Court, like the Bankruptcy Court, held that Moran had no relevant contacts with Idaho. The District Court premised jurisdiction over Moran on a theory that he allegedly conspired with the other Petitioners to defraud creditors in Idaho. The "evidence" of conspiracy essentially was the allegation in the Amended Complaint that Moran voted as a director block with the other Petitioners at Gulf on the commercial transactions and the unsupported allegation that Moran benefitted from those transactions (A 51a-52a). While acknowledging that the misrepresentation claim was the sole connection between any of the Petitioners and Idaho, the District Court specifically refused to consider whether the

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[11] Hudd denied making any misrepresentations whatsoever.

Respondents had subject matter jurisdiction to bring that claim.[12] If the Respondents lacked standing to assert the misrepresentation claim, the jurisdictional nexus between the Petitioners and Idaho would evaporate.

The District Court then turned to the second prong of the due process test: whether, "but for" the contacts with Idaho, the cause of action would not have arisen. The District Court, with little analysis, found this prong of the test was met with respect to all of the claims against the Petitioners despite the fact that their purported Idaho contacts were limited to alleged misrepresentations (A 52a-53a). The District Court acknowledged that the alleged misrepresentations occurred *after* many of the transactions at issue in the Amended Complaint (A 53a) and presumably could not have impacted the transactions about which Respondents complain. The District Court, however, relied on those contacts when asserting jurisdiction over the Petitioners for the transactions.

The District Court found the assertion of personal jurisdiction over the Petitioners to be reasonable despite the facts that the Petitioners are foreign citizens and residents who had few if any contacts with Idaho and that the transactions complained of did not occur in Idaho (or, in many cases, in the U.S.) or involve Idaho entities or residents (A 53a-56a). Finally, the District Court held, without analysis, that service of process on foreign defendants in an adversary proceeding may be accomplished pursuant to Bankruptcy Rule 7004(a) as well as Bankruptcy Rule 7004(e) (A 56a).

By order dated October 11, 1996, the Ninth Circuit Court of Appeals granted the Petitioners leave to appeal from the

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[12] The District Court believed the subject matter jurisdiction issue was unrelated to personal jurisdiction and thus declined to decide it (A 56a n.16). The misrepresentation claim is the only connection between the Petitioners and Idaho. If Respondents cannot assert a misrepresentation claim, there is no jurisdictional nexus with Idaho and the assertion of personal jurisdiction over the Petitioners in Idaho is improper.

District Court's opinion and order (A 27a-28a). No doubt recognizing that personal jurisdiction over the Petitioners was simply not tenable under the law applied below, the Court of Appeals did not address the Idaho long-arm statute and due process issues that were addressed by the courts below. Instead, the Ninth Circuit found that the Petitioners were subject to jurisdiction in Idaho under Federal Rule of Civil Procedure 4(k)(2), made applicable to the proceeding by recent amendments to Rule 7004 of the Federal Rules of Bankruptcy Procedure (A 8a-14a).

The Court of Appeals found that the December 1, 1996 amendments to Bankruptcy Rule 7004 were applicable to this proceeding. In making this finding, the Ninth Circuit held that amended Bankruptcy Rule 7004 could be applied retroactively without undue prejudice to the Petitioners, in part, because the Petitioners did not offer factual evidence that they would have behaved differently if they had expected amended Bankruptcy Rule 7004(f) to apply (A 11a). This holding overlooks the fact that amended Bankruptcy Rule 7004 did not exist at the time factual evidence was submitted to the Bankruptcy Court, so the Petitioners never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on the Petitioners' conduct.

Until December 1, 1996, the date that the amendments to Bankruptcy Rule 7004 took effect (A 181a), there was no basis for the courts to assert personal jurisdiction over Petitioners. And, as set forth above, the statutes of limitations applicable to the underlying causes of action had run by that date. Thus, the Ninth Circuit's retroactive application of the amendments to Bankruptcy Rule 7004 to the underlying adversary proceeding extends the statutes of limitations, a result that contravenes its own precedent and that of this Court.

REASONS FOR GRANTING THIS PETITION

This appears to be the first and only Court of Appeals decision to date to address the question of whether amended Bankruptcy Rule 7004 should be applied retroactively to a pending adversary proceeding and thus is properly before this Court for review. By mechanically applying *dictum* from this Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), the Ninth Circuit has brought to life claims for relief against the Petitioners that never should have been brought in Idaho in the first place and which would have long ago been dismissed had the lower courts properly applied the law as it existed at the time those decisions were made. Such a result is neither just nor practicable and should not be allowed to stand.

I. The Ninth Circuit Erred By Retroactively Applying The Recent Amendments To The Bankruptcy Rules To The Underlying Adversary Proceeding

In its order adopting the 1996 amendments to the Bankruptcy Rules, this Court stated that the amendments would apply to cases pending on December 1, 1996 only where it was "just and practicable" to do so. 1996 U.S. Order 96-14 (Order of the Supreme Court of the United States Adopting and Amending Rules, Apr. 23, 1996) (A 181a). To apply the new rule in these circumstances is neither just nor practicable. On December 1, 1996, the statutes of limitations applicable to the underlying causes of action had run. The application of the new Rule to this case would alter the rights of the Petitioners by providing a basis for jurisdiction that did not exist at the time of the events underlying this action, at the time the action was commenced, or at the time the motion to dismiss was made. It would also revive causes of action that would otherwise be barred by the applicable statutes of limitations.

In making this decision, the Ninth Circuit ignored its own precedent, which recognized that even where a statute is procedural in nature, it may be unjust to apply the statute retroactively. *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994). In *Chenault*, the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought. *Id.*[13] Application of the new Rule would subject Petitioners to a claim in Idaho to which they otherwise would not be subject. The new Rule would thus prejudice the rights of the Petitioners as well as increase their liability.

Whether a defendant reasonably anticipated being haled into court in a particular forum is at the heart of the jurisdictional inquiry here. At the time of the events in question, the Petitioners could not have anticipated being haled into court in Idaho.[14] Under the Rule in effect until December 1, 1996, the Petitioners' contacts with Idaho were insufficient to justify personal jurisdiction. This was implicitly recognized by the Ninth Circuit which refused even to address the application of the Idaho long-arm statute to Petitioners below. New Rule 7004(f) completely alters the jurisdictional test, allowing a defendant's aggregate national contacts to provide a

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[13] *Landgraf*, 511 U.S. at 291 (1994) (Scalia, J., concurring) ("Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered") (emphasis added).

[14] Limits upon the assertion of personal jurisdiction which are based on defendants' reliance interest are well-established in our constitutional jurisprudence. And, in evaluating whether the exercise of long-arm jurisdiction comports with due process, this Court has emphasized the unfairness of requiring a party to litigate in an unanticipated forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (whether a defendant "should reasonably anticipate being haled into court" in the forum state is a crucial consideration, and due process "allows potential defendants . . . some minimum assurance as to where [their] conduct will and will not render them liable to suit").

basis for jurisdiction. The Bankruptcy Rule in place at the time of the activities underlying this action should therefore be applied. *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1424 n.2 (D. Nev. 1994) ("personal jurisdiction should be assessed according to the long arm statute in effect at the time the claim arose. Because jurisdiction is limited to claims arising out of forum-related activities, due process requires that the defendant have fair notice that such activities may expose it to local jurisdiction").

In rendering its decision, the Ninth Circuit stated that "Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors" (A 11a). But, as set forth in greater detail above, Petitioners' "conduct" could not lead to jurisdiction under the Idaho long-arm statute. The Petitioners' contacts with Idaho are simply too limited to constitute purposeful availment of the forum. Indeed, Moran had no contacts with Idaho whatsoever (A 51a, 121a).

And, since amended Bankruptcy Rule 7004(f) was not even in existence at the time the motion to dismiss was submitted to the Bankruptcy Court, the Petitioners did not and could not submit any factual evidence to show how they would have behaved differently had they expected the amended Rule to apply. It was not possible for the Petitioners to have submitted evidence regarding the effects of amended Bankruptcy Rule 7004(f) because that Rule did not exist. At the very least, this case ought to be remanded to afford Petitioners the opportunity to present evidence of how their conduct would have been different if they had known that these amendments would apply. In all events, however, whether Petitioners would have changed their conduct if they had known the amendments would apply is not determinative. *Chenault*, 37 F.3d at 539 (focus on prejudice to defendant, not whether defendant would have altered its conduct).

The Ninth Circuit's reliance on this Court's decision in *Landgraf* is misplaced. There, this Court decided whether a non-jurisdictional remedial statute that created an additional remedy for sexual harassment claims should apply retroactively where there was *no indication* of whether the statute was intended to apply to cases that were pending when it became effective. *Landgraf*, 511 U.S. at 280.[15] In contrast, the enabling order in the present case provides that the revised rules apply to pending cases only where "just and practicable" (A 181a). The Court made clear that, in deciding retroactivity, the first consideration is the expressed intent, if any, of the legislature, because if there is an express prescription, "there is no need to resort to judicial default rules" for deciding retroactivity. *Landgraf*, 511 U.S. at 280. In *Landgraf*, there was no such prescription, so the court relied upon a "deeply rooted" presumption against retroactivity. *Id.* at 265.

In *dictum*, the Court also observed that, in the absence of express prescriptions, statutes affecting jurisdiction "regularly" have been applied retroactively (*id.* at 274), cautioning, however, that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," that the Court favored "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Id.* at 275 n.29. The Court gave examples of prior cases in which the potential retroactivity of jurisdictional changes had been considered. *Id.* at 274. All but one of those cases involved changes in a court's subject-matter jurisdiction. The sole exception involved a change in

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[15] In *Landgraf*, this Court clarified that "prospectivity remains the appropriate default rule" and that *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), which states that a court should apply the law in effect at the time of the decision, "did not alter [this] well-settled presumption." *Landgraf*, 511 U.S. at 272, 277. The Court distinguished cases such as *Bradley* which consider statutes involving issues that are separable from the cause of action and that do not impose an additional or unforeseeable obligation upon the defendant.

rules relating to the location of the *res* for purposes of *in rem* jurisdiction; in that case the Court declined to apply the change retroactively. None of the cases involved a change in rules governing *in personam* jurisdiction.

Moreover, in the present case, unlike in *Landgraf*, there *is* an express prescription regarding retroactivity in the Supreme Court order that amended Rule 7004. Consistent with the "common-sense" approach referred to in *Landgraf*, the Supreme Court order expressly provides that the amendment should apply retroactively only "insofar as just and practicable" (A 181a). Retroactive application of amended Rule 7004 to this case would contravene this prescription, because it would not be "just" in "the posture of the particular case" (*Landgraf*, 511 U.S. at 275 n.29). Up until December 1, 1996 (the date the amended bankruptcy rules took effect), there was no legally proper basis for the assertion of personal jurisdiction over the Petitioners and the statutes of limitations applicable to the underlying causes of action had run. It would not be "just" to use a jurisdictional amendment to extend the statutes of limitations on causes of action which should have been dismissed long ago. The applicable considerations are no different from the ones that led the Ninth Circuit to conclude that legislation extending a statute of limitation should not apply retroactively because the defendant "would be forced to defend an action that was previously time-barred." *Chenault*, 37 F.3d at 539.

McGee v. International Life Ins. Co., 355 U.S. 220 (1957), relied upon by the Ninth Circuit is distinguishable because it did not require retroactive application of the statute. In that case, this Court examined whether applying an amended statute to a contract entered into prior to the amendment would unconstitutionally impair the contract. *McGee*, 355 U.S. at 224. The case was decided under the Contracts Clause of the Constitution, and the Court held that the statute "neither enlarged nor impaired respondent's substantive rights or obligations under the contract." *Id.* Unlike the present case,

McGee was based on a contract with substantial connection to the forum. *Id.* at 223.

Another case relied upon by the Ninth Circuit, *Arrowhead Estates Dev. Co. v. United States Trustee (In re Arrowhead Estates Dev. Co.)*, 42 F.3d 1306 (9th Cir. 1994) is also distinguishable from the case at bar. The *Arrowhead* court considered the retroactive application of an amendment to Bankruptcy Rule 8002(a) that provided that a notice of appeal filed after the announcement of an order but prior to its entry would be valid.[16] *Arrowhead* addresses a technical amendment to the rules governing the manner in which an appeal can be taken. That rule merely eliminated a "trap" invalidating otherwise valid appeals based on a formalistic timing requirement. *Arrowhead*, 42 F.3d at 1310. In contrast, new Rule 7004(f) provides personal jurisdiction where jurisdiction was lacking prior to the enactment of the statute. Retroactive application of this rule thus implicates constitutional and fairness concerns about prejudice to a defendant's rights not present in *Arrowhead*.

The retroactive application of revised Rule 7004(f) to this matter by the Ninth Circuit prejudices the rights of the Petitioners and is neither just nor practicable. Accordingly, the Rule in force prior to December 1, 1996 that was applied by the lower courts should be applied here and the case should be dismissed.

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[16] Prior to *Arrowhead*, a notice to appeal filed before entry of an order had no effect. *Arrowhead*, 42 F.3d at 1309-10.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Dated: April 14, 1998

Respectfully submitted,

Lawrence A. Blatte
Counsel of Record
James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212)-303-9000

Counsel for Petitioners
David J. Rowland, Jeremy E. James, David L. Hudd and Derek Moran

No. _____

Supreme Court, U.S.
FILED

971683 APR 14 1998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Lawrence A. Blatte
Counsel of Record
James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36062

D.C. No. CV-96-00010-EJL

In re: PINTLAR CORPORATION; GULF USA CORP.,

Debtors.

BERNARD GOODSON; FORD ELSAESSAR;
LOWELL FINLEY; and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Appellees,

—v.—

DAVID J. ROWLAND; JEREMY E. JAMES;
DAVID L. HUDD; DEREK J. MORAN.

Defendants-Appellants.

No. 96-36063
D.C. No. CV-96-00011-EJL

In re: PINTLAR CORPORATION; GULF USA CORP.,

Debtors.

BERNARD GOODSON; FORD ELSAESSAR;
LOWELL FINLEY; and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Appellees,

—v.—

DAVID J. ROWLAND; JEREMY E. JAMES;
DAVID L. HUDD; DEREK J. MORAN.

Defendants,

—and—

INOCO PLC, a United Kingdom corporation,

Defendant-Appellant.

AMENDED OPINION

Appeals from the United States District Court
for the District of Idaho
Edward J. Lodge, Chief Judge, Presiding

Argued and Submitted September 9, 1997
(No. 96-36062)

Submitted on the Briefs September 9, 1997*
(No. 96-36063)
Seattle, Washington

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

Filed November 3, 1997
Amended January 14, 1998

Before: Eugene A. Wright and Mary M. Schroeder, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Opinion by Judge Schwarzer

SUMMARY

Bankruptcy/Litigation and Procedure

The court of appeals affirmed a judgment of the district court. The court held that a new bankruptcy rule of personal jurisdiction over foreign residents applies to an action pending on its effective date if it is "just and practicable."

Appellee Bernard Goodson and other trustees of a litigation trust brought a bankruptcy adversary proceeding in 1994 against appellants Inoco Plc, David Rowland, Jeremy James, David Hudd, and Derek Moran (Rowland Directors) to recover assets of debtors Gulf USA Corporation and its subsidiary, Pintlar Corporation. The complaint alleged that the Rowland Directors and Inoco had looted and wasted Gulf's assets.

The Rowland Directors were foreign citizens who resided outside the United States. Inoco is a publicly traded United Kingdom corporation headquartered in England. The alleged liabilities arose out of Pintlar's former ownership of the Bunker Hill Mine in Idaho, whose operation caused environmental damage. Other claims related to medical and pension benefits of retired Idaho employees. The creditors owning these claims were the beneficiaries of the litigation trust.

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

The bankruptcy court granted a defense motion to dismiss certain claims. On appeal, the district court ruled that the Idaho contacts of directors Rowland, Hudd and James were sufficient to find that they purposefully availed themselves of the Idaho forum. As to Moran and Inoco, the court determined that allegations of conspiracy were sufficient to satisfy the "purposeful availment" test. The court concluded that the exercise of specific personal jurisdiction under the Idaho longarm statute would not be unreasonable, and held them subject to personal jurisdiction on all the trustees' claims except one.

On appeal, the trustees asserted that personal jurisdiction over the defendants was provided by Bankruptcy Rule 7004(f), which became effective in 1996 while the adversary action was pending. The Rowland Directors and Inoco contended that to apply Rule 7004(f) to them would prejudicially revive claims that were otherwise barred by the prior rule, which did not authorize personal jurisdiction over nonresidents on the basis of national contacts, in the absence of statutory authority.

If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, personal jurisdiction may be obtained over nonresidents sued in proceedings under the Bankruptcy Code who are served in conformity with Rule 7004(a) or the applicable subdivision of Fed. R. Civ. P. 4. The threshold question was whether the new Rule 7004(f) could be applied to an action commenced in 1994. The Supreme Court's order adopting the amended rules states that *insofar as just and practicable*, they govern all pending bankruptcy proceedings.

Applying the rule to this action was plainly practicable. Jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. The presumption against retroactive application of new legislation to pending cases does not apply to rules conferring or withdrawing jurisdiction.

The argument that the defendants could not reasonably have expected being haled into court in Idaho was unpersuasive, since they had at least to reckon with application of the Idaho longarm statute to their dealings affecting Idaho creditors. None of the defendants offered facts to show that they would have behaved differently had they expected Rule 7004(f) to apply, or that they were otherwise prejudiced. Also weighing against their arguments was the policy favoring consolidation in a common forum of all litigation relating to a bankruptcy.

The complaint was a civil proceeding arising under the Bankruptcy Code. The defendants were served in accordance with Rule 7004. Rowland contended that he was not properly served under pre-amendment Rule 7004(e), which states that the summons and complaint *may* be served as provided in Rule 4(d)(1) and (d)(3) for service in a foreign country. Rowland was served pursuant to Rule 4(i), which is made applicable to adversary proceedings in bankruptcy under Rule 7004(a). As it was in 1990, Rule 4(i) stated that a defendant in a foreign country could be served in any one of five specified methods. The district court correctly held the service under Rule 4(i) to be sufficient. Its ruling was consistent with that of other court's, finding Rule 7004(e) to be permissive, not mandatory.

The exercise of jurisdiction was consistent with the Constitution and laws of the United States. The defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting foreseeably caused Gulf injury in the United States. The alleged injuries arose out of the defendants' purposeful direction of their activities toward the United States. As part of the conspiracy to loot Gulf, Inoco purposefully injected itself into the United States.

COUNSEL

Lawrence E. Carnevale, Carter, Ledyard & Milburn, New York, New York; John T. Mitchell, Mitchell & Mitchell, Coeur D'Alene, Idaho, for the defendants-appellants.

Richard W. Reinthaler, New York, New York; Dianne Coffino, New York, New York; Givens, Pursley & Huntley, Boise, Idaho, for the plaintiffs-appellees.

OPINION

SCHWARZER, Senior District Judge:

We must decide whether the bankruptcy court had personal jurisdiction over the defendants in this adversary proceeding under Fed. R. Bankr. P. 7004(f) ("Rule 7004(f)"), as amended subsequent to the commencement of this action.

I. Procedural Background

Plaintiffs, the trustees (the "Trustees") of a litigation trust (the "Litigation Trust"), brought this adversary proceeding against defendants David J. Rowland, Jeremy E. James, David L. Hudd, Derek J. Moran (the "Rowland Directors") and Inoco Plc ("Inoco") to recover certain assets belonging to debtors Gulf USA Corporation ("Gulf") and its subsidiary, Pintlar Corporation ("Pintlar"). The amended complaint alleged counts for fraudulent conveyance under Bankruptcy Code §§ 544, 548 and 550, and for misrepresentation, breach of fiduciary duties, civil conspiracy, breach of contract and violation of Delaware corporation law. The bankruptcy court granted defendants' motion to dismiss count II (corporate waste and mismanagement) for lack of personal jurisdiction but denied the motion with respect to the other counts. On interlocutory appeal, the district court affirmed the bankruptcy court's order as to all counts except count VI (breach of contract), dismissing that count, and count II (cor-

porate waste and mismanagement), reinstating that count. The district court certified its order for interlocutory appeal and we granted the Rowland Directors and Inoco permission to appeal under 28 U.S.C. § 1292(b); the Trustees do not appeal the dismissal of the breach of contract count.

II. Factual Background

The Rowland Directors are foreign citizens who reside outside of the United States. Inoco is a publicly traded United Kingdom corporation, headquartered in England. At all relevant times, the Rowland Directors were officers of Inoco and Rowland, through intermediaries, owned a controlling interest in Inoco. The Rowland Directors acquired control of Gulf in 1989 when Inoco, through a subsidiary, purchased 34% of Gulf's outstanding shares. At the time, Gulf had assets exceeding $177 million but it also had potentially large liabilities. These liabilities arose out of the former ownership of the Bunker Hill mine by Gulf's subsidiary, Pintlar. They largely involve claims for environmental damage caused by the Idaho operations of Bunker Hill and claims for medical and pension benefits by its retired Idaho employees. The creditors holding these claims are beneficiaries of the Litigation Trust.

In their complaint, the Trustees allege that the Rowland Directors and Inoco, after taking control of Gulf, engaged in a course of conduct to loot and waste the assets of the company. They allege that the defendants entered into a series of transactions by which they transferred Gulf's assets into their control. When creditors became concerned over Gulf's ability to meet its obligations, Rowland sent a letter to former employees of Bunker Hill in Idaho, assuring them that Gulf would meet its obligations for employee benefits and environmental clean-up, assurances alleged to be false and fraudulent. In 1991, the Rowland Directors sold Inoco and their shares in Gulf. In 1993, involuntary bankruptcy petitions were filed against Gulf and Pintlar in the District of Idaho. This adversary proceeding followed. In it the Trustees seek to

recover for the benefit of the Litigation Trust the assets of Gulf and Pintlar, which they claim were looted by defendants.

The district court held that the Idaho contacts of Rowland, Hudd and James were sufficient to find that they purposefully availed themselves of the Idaho forum. With respect to Moran and Inoco, the court found that, although they were not alleged to have taken actions directed at Idaho, the allegations of conspiracy were sufficient to satisfy the purposeful availment test. Parsing the controlling factors, the court concluded that the exercise of specific personal jurisdiction over the defendants under the Idaho long-arm statute would not be unreasonable and held them subject to personal jurisdiction on all claims other than the contract claim. We affirm, but on a different ground.

III. Standard of Review

Plaintiffs have the burden of establishing personal jurisdiction but need to make only a prima facie showing of jurisdictional facts to avoid a motion to dismiss. *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990). We review the record in the district court de novo to determine whether plaintiffs have established a prima facie case for personal jurisdiction over defendants. *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d 267, 269 (9th Cir. 1995). Factual findings are reviewed for clear error. *Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 n.2 (9th Cir. 1987). All factual disputes are resolved in favor of the Trustees. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987).

IV. Personal Jurisdiction under Rule 7004(f)

A. *Application of the Rule to the Pending Action*

In 1994, when the Trustees commenced this action, Rule 7004 did not authorize personal jurisdiction over nonresidents on the basis of national contacts. The rule was amended,

effective December 1, 1996,[1] to add subsection (f) which provides;

> (f) Personal Jurisdiction
>
> If the exercise of jurisdiction is consistent with the Constitution and the laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person or any defendant with respect to a case under the Code, or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

Fed. R. Bankr. P. 7004(f). Thus, under the new rule, personal jurisdiction may be obtained in proceedings under the Bankruptcy Code over nonresidents who are served in conformity with Rule 7004(a) or the applicable subdivisions of Fed. R. Civ. P. 4 ("Civil Rule 4") so long as the exercise of jurisdiction is consistent with the Constitution. *See* Fed. R. Bankr. P. 7004(f) and advisory committee notes (1996 Amendments) ("[S]ervice or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant.").

The threshold question is whether the new Rule 7004(f) may be applied to an action commenced in 1994. The Supreme Court's order adopting the amended rules states that they "shall govern all proceedings . . . thereafter commenced and, *insofar as just and practicable*, all proceedings in bankruptcy then pending." Communication from the Chief Justice, *Amendments to the Federal Rules of Bankruptcy Procedure that Have Been Adopted by the Court*, at 2, Apr. 24, 1996 (emphasis added). Application of the rule to this action therefore turns on whether it would be just and practicable.

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[1] The district court took note of the forthcoming amendment but its order was issued before the effective date of the amendment.

While in some circumstances we would remand so that the district court may exercise its discretion, we see no need to do so here. Remand is not necessary where the issue has been fully briefed on appeal, the record is clear and remand would "impose needless additional expense and delay. . . ." *Foster v. Skinner*, 70 F.3d 1084, 1089 (9th Cir. 1995) (citing *Roundtree v. United States*, 40 F.3d 1036, 1040 (9th Cir. 1994)); *Hoffman v. GMAC*, 814 F.2d 1385, 1387 (9th Cir. 1987).

This appeal is interlocutory and is limited to the issue of personal jurisdiction. Both sides have thoroughly briefed the issue, and applying the rule to this action is plainly practicable. Defendants argue, however, that to do so would be prejudicial because the claims against them would otherwise be barred by the prior rule. Their reliance on *Chenault v. USPS*, 37 F.3d 535 (9th Cir. 1994), is misplaced. We held there that a newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought "because to do so would be manifestly unjust." *Id.* at 539. This clearly is not such a case. As the Supreme Court stated in *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994), "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " *See also Duldulao v. INS*, 90 F.3d 396, 399 (9th Cir. 1996) (stating that "the 'presumption against retroactive application of new legislation to pending cases . . . does not apply to rules conferring or withdrawing jurisdiction.' " (citation omitted)); *Arrowhead Estates Dev. Co. v. United States Trustee*, 42 F.3d 1306, 1311 (9th Cir. 1994) (same); *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985) (stating that "when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases");

see also Driscoll v. Gebert, 458 F.2d 421 (9th Cir. 1972) (holding that newly enacted California long-arm statute applied to previously filed pending action).

Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors. None of the defendants offer facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced.[2] *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 224 (1957) (stating that defendant "had no vested right not to be sued in California"). Moreover, weighing against defendants' arguments is the policy favoring consolidation in a common forum of all litigation relating to a bankruptcy in the interest of economy and efficiency—as opposed to having the litigation dispersed across two continents.

B. *Applying Rule 7004(f)*

Defendants contend that even if Rule 7004(f) applies, personal jurisdiction cannot be exercised until the court determines that the defendants are "not subject to the jurisdiction of the courts of general jurisdiction of any state." Fed. R. Civ. P. 4(k)(2). Defendants' argument rests on the assumption that jurisdiction under Rule 7004(f) is subject to this limitation found in Civil Rule 4(k)(2). For support they rely on the introductory sentence of the advisory committee notes to the 1996 Amendment of Rule 7004 which states, "The new subdivision (f) is consistent with the 1993 amendments to F.R.Civ.P. 4(k)(2)." Fed. R. Bankr. P. 7004 advisory committee notes (1996 Amendments).

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[2] In their Petitions for Rehearing, appellants argue that they did not have an opportunity to offer facts to show "that they would have behaved differently had they expected amended Rule 7004(f) to apply." It is difficult to see how Rule 7004(f) might have induced them into behavior that the long-arm statute did not. The argument, in any event, is not persuasive in light of their failure to give any indication in their briefs or petitions what facts they might have offered for this purpose.

The plain language of Rule 7004(f) refutes the argument. It omits the critical language of Civil Rule 4(k)(2) that limits application to "any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state." That the rule is not cloned from Civil Rule 4(k)(2) is shown, as well, by other differences in the text of the two rules. First, Rule 7004 cross-references only to those subdivisions of Civil Rule 4 "made applicable by these rules" and that does not include Rule 4(k)(2). *See* Fed. R. Bankr. P. 7004(a) ("Rule 4(a), (b), (c)(1), (d)(1), (e)-(j), (l), and (m) F.R.Civ.P. applies in adversary proceedings."). Second, Rule 7004(f)'s application is narrower than Civil Rule 4; Rule 7004(f) is limited to cases or civil proceedings arising or related to a case under the Bankruptcy Code. Finally, the advisory committee statement relied on by defendant is further explained by the sentence immediately following which states, "[Rule 7004(f)] clarifies that service or filing a waiver of service in accordance with this rule or the applicable subdivisions of F.R.Civ.P. 4 is sufficient to establish personal jurisdiction over the defendant." Fed. R. Bankr. P. 7004(f) advisory committee notes. That statement confirms that the drafters' purpose was to incorporate the service provisions of the amended Civil Rule 4, not its limitation on personal jurisdiction.[3] We therefore decline to import into Rule 7004(f) the "not subject to the jurisdiction . . . of any state" limitation of Civil Rule 4(k)(2).

Applying Rule 7004(f) as written, all of the requisite elements to support the exercise of jurisdiction are present.

The complaint, alleging claims under 11 U.S.C. §§ 544, 548, and 550, is a "civil proceeding arising under the [Bankruptcy] Code." Fed. R. Bankr. P. 7004(f).

The defendants were served "in accordance with [Rule 7004] or the subdivisions of Rule 4 F.R.Civ.P. made appli-

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[3] This makes Rule 7004(f) consistent with the expansive jurisdictional reach of the bankruptcy courts, which are empowered to exercise jurisdiction over a debtor's property wherever located. *See* 28 U.S.C. § 1334(e).

cable by [Rule 7004]." Fed. R. Bankr. P. 7004(f). Rowland contends he was not properly served under pre-amendment Rule 7004(c) which states, "[t]he summons and complaint . . . *may* be served as provided in [Civil Rule] 4(d)(1) and (d)(3)" for service in a foreign country. Fed. R. Bankr. P. 7004(e) (emphasis added). Rowland was served instead pursuant to Civil Rule 4(i) which is made applicable to adversary proceedings in bankruptcy under Rule 7004(a). *See* Fed. R. Bankr. P. 7004(a). Civil Rule 4(i), as it was in 1990, contained "Alternative Provisions for Service in a Foreign Country," and stated that a defendant in a foreign country may be served by any one of five specified methods. The district court correctly held service under Rule 4(i) to be sufficient. Its ruling was consistent with that of other courts, finding Rule 7004(e) to be permissive, not mandatory. *See Schwinn Plan. Comm. v. AFS Cycle & Co.*, 190 B.R. 599, 608 (Bankr. N.D. Ill. 1995); *Official Comm. of Unsecured Creditors of Southold Dev. Corp. v Mittemyer*, 148 B.R. 726, 728 (Bankr. E.D.N.Y. 1992); *In re Crysen/Montenay Energy Co. v. E & C Trading Ltd.*, 166 B.R. 546, 548-49 (Bankr. S.D.N.Y. 1994).

Finally, "the exercise of jurisdiction is consistent with the Constitution and the laws of the United States." Fed. R. Bankr. P. 7004(f). While the Rowland Directors do not contest the constitutional basis for personal jurisdiction, Inoco contends that it lacked sufficient contacts with the United States. The bankruptcy judge's findings suffice to establish defendants' contacts with the United States:

> Thus, these alien defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located. . . . [T]he alleged injures arise out of the defendants' purposeful direction of their activities toward the United States. . . .
>
> * * *

> Inoco's sale of property located in Texas and New York to Gulf was activity directed to the United States . . . As part of the conspiracy to loot Gulf, Inoco took control of a United States corporation. . . . Inoco purposefully interjected itself into the United States.

V. Conclusion

The order of the district court is AFFIRMED and the matter is REMANDED for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36062
D.C. No. CV-96-00010-EJL

In re: PINTLAR CORPORATION; GULF USA CORP.,

Debtors.

BERNARD GOODSON; FORD ELSAESSAR; LOWELL FINLEY; and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Appellees,

—v.—

DAVID J. ROWLAND; JEREMY E. JAMES; DAVID L. HUDD; DEREK J. MORAN,

Defendants-Appellants.

No. 96-36063
D.C. No. CV-96-00011-EJL

In re: PINTLAR CORPORATION; GULF USA CORP.,

Debtors.

BERNARD GOODSON; FORD ELSAESSAR; LOWELL FINLEY; and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Appellees,

—v.—

DAVID J. ROWLAND; JEREMY E. JAMES; DAVID L. HUDD; DEREK J. MORAN,

Defendants,

—and—

INOCO PLC, a United Kingdom corporation,

Defendant-Appellant.

OPINION

Appeals from the United States District Court
for the District of Idaho
Edward J. Lodge, Chief Judge, Presiding

Argued and Submitted September 9, 1997
(No. 96-36062)

Submitted on the Briefs September 9, 1997*
(No. 96-36063)
Seattle, Washington

Filed November 3, 1997

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and 9th Cir. R. 34-4.

Before:

Eugene A. Wright and Mary M. Schroeder, *Circuit Judges*, and William W Schwarzer,* *Senior District Judge*.

Opinion by Judge Schwarzer

SUMMARY

The summary, which does not constitute a part of the opinion of the court, is copyrighted © 1994 by Barclays Law Publishers.

Bankruptcy/Litigation and Procedure

The court of appeals affirmed an order of the district court. The court held that a new bankruptcy rule of personal jurisdiction over foreign residents applies to an action pending on its effective date if its is "just and practicable."

Appellee Bernard Goodson and other trustees of a litigation trust brought a bankruptcy adversary proceeding in 1994 against appellants Inoco Plc, David Rowland, Jeremy James, David Hudd, and Derek Moran (Rowland Directors) to recover assets of debtors Gulf USA Corporation and its subsidiary, Pintlar Corporation. The complaint alleged that the Rowland Directors and Inoco had looted and wasted the assets of the company.

The Rowland Directors were foreign citizens who resided outside the United States. Inoco is a publicly traded United

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Kingdom corporation headquarted in England. Their alleged liabilities arose out of Pintlar's former ownership of the Bunker Hill Mine in Idaho, whose operation caused environmental damage. Other claims related to medical and pension benefits of retired Idaho employees. The creditors owning these claims were the beneficiaries of the litigation trust.

The bankruptcy court granted a defense motion to dismiss certain claims. On appeal, the district court ruled that the Idaho contacts of directors Rowland, Hudd and James were sufficient to find that they purposefully availed themselves of the Idaho forum. As to Moran and Inoco, the court determined that allegations of conspiracy were sufficient to satisfy the purposeful availment test. The court concluded that the exercise of specific personal jurisdiction under the Idaho longarm statute would not be unreasonable, and held them subject to personal jurisdiction on all the trustees' claims except one.

On appeal, the trustees asserted that personal jurisdiction over the defendants was provided by Bankruptcy Rule 7004(f), which became effective in 1996, while the adversary action was pending. The Rowland Directors and Inoco contended that to apply Rule 7004(f) to them would prejudicially revive claims that were otherwise barred by the prior rule, which did not authorize personal jurisdiction over nonresidents on the basis of national contacts, in the absence of statutory authority.

So long as the exercise of jurisdiction is consistent with the Constitution, jurisdiction may be obtained over nonresidents sued on a federal claim who are served in conformity with Rule 7004(a) and Fed. R. Civ. P. 4(f). The threshold question was whether the new Rule 7004(f) could be applied to an action commenced in 1994. The Supreme Court's order adopting the amended rules states that insofar as just and practicable, they govern all pending bankruptcy proceedings.

Applying the rule to this action was plainly practicable. Jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties. The presumption against retroactive application of new legislation to

pending cases does not apply to rules conferring or withdrawing jurisdiction.

The argument that the defendants could not reasonably have expected being haled into court in Idaho was unpersuasive, since they had at least to reckon with application of the Idaho longarm statute to their dealings affecting Idaho creditors. None of the defendants offered facts to show that they would have behaved differently had they expected Rule 7004(f) to apply, or that they were otherwise prejudiced. Also weighing against their arguments was the policy favoring consolidation in a common forum of all litigation relating to a bankruptcy.

The complaint alleged claims arising under federal law. The Rowland Directors did not challenge the constitutional basis for personal jurisdiction. With respect to their contacts and those of Inoco with the United States, they reached out to Gulf and forged a continuing relationship with it. The alleged looting foreseeably caused Gulf injury in the United States. The alleged injuries arose out of the purposeful direction of their activities toward the United States. Inoco's sale of property was actively directed to the United States. Inoco took control of a United States corporation and purposefully interjected itself into the United States.

Rowland was served pursuant to Rule 4(i). As it was in 1990, that rule stated that a defendant in a foreign country could be served in any one of five specified methods. Rule 7004(a) stated that Rule 4(i) applied in adversary proceedings. The district court correctly held the service under Rule 4(i) to be sufficient.

COUNSEL

Lawrence E. Carnevale, Carter, Ledyard & Milburn, New York, New York; John T. Mitchell, Mitchell & Mitchell, Coeur D'Alene, Idaho, for the defendants-appellants.

Richard W. Reinthaler, New York, New York; Dianne Coffino, New York, New York; Ramona S. Neal, Givens, Pursley & Huntley, Boise, Idaho, for the plaintiffs-appellees.

OPINION

SCHWARZER, Senior District Judge:

We must decide whether the bankruptcy court had personal jurisdiction of the defendants in this adversary proceeding under Bankruptcy Rule 7004(f), as amended subsequent to the commencement of this action.

I. Procedural Background

Plaintiffs are the trustees of a litigation trust (the Trustees) who brought this adversary proceeding against defendants David. J. Rowland, Jeremy E. James, David L. Hudd, Derek J. Moran (the Rowland Directors) and Inoco Plc (Inoco) to recover certain assets belonging to debtors Gulf USA Corporation (Gulf) and its subsidiary, Pintlar Corporation (Pintlar). The amended complaint alleged counts for fraudulent conveyance under Bankruptcy Code sections 544, 548 and 550, and for misrepresentation, breach of fiduciary duties, civil conspiracy, breach of contract and violation of Delaware corporation law. The bankruptcy court granted defendants' motion to dismiss count II (corporate waste and mismanagement) for lack of personal jurisdiction but denied the motion with respect to the other counts. On interlocutory appeal, the district court affirmed the bankruptcy court's order as to all counts except count VI (breach of contract), dismissing that count, and count II (corporate waste and mismanagement), reinstating that count. The district court certified its order for

interlocutory appeal and we granted the Rowland Directors and Inoco permission to appeal under 28 U.S.C. § 1292(b); the Trustees do not appeal the dismissal of the breach of contract count.

II. Factual Background

The Rowland Directors are foreign citizens who reside outside of the United States. Inoco is a publicly traded United Kingdom corporation, headquartered in England. At all relevant times, the Rowland Directors were officers of Inoco and Rowland, through intermediaries, owned a controlling interest in Inoco. The Rowland Directors acquired control of Gulf in 1989 when Inoco, through a subsidiary, purchased 34% of Gulf's outstanding shares. At the time, Gulf had assets exceeding $177 million but it also had potentially large liabilities. These liabilities arose out of the former ownership of the Bunker Hill mine by Gulf's subsidiary, Pintlar. They largely involve claims for environmental damage caused by the Idaho operations of Bunker Hill and claims for medical and pension benefits by its retired Idaho employees. The creditors holding these claims are beneficiaries of the plaintiff Litigation Trust.

In their complaint, the Trustees allege that the Rowland Directors and Inoco, after taking control of Gulf, engaged in a course of conduct designed to loot and waste the assets of the company. They allege that the defendants entered into a series of transactions by which they transferred Gulf's assets into their control. When creditors became concerned over Gulf's ability to meet its obligations, Rowland sent a letter to former employees of Bunker Hill in Idaho, assuring them that Gulf would meet its obligations for employee benefits and environmental clean-up, assurances alleged to be false and fraudulent. In 1991, the Rowland Directors sold Inoco and their shares in Gulf. In 1993, involuntary bankruptcy petitions were filed against Gulf and Pintlar in the District of Idaho. This adversary proceeding followed. In it the Trustees seek to

recover for the benefit of the Litigation Trust the assets of Gulf and Pintlar, which they claim were looted by defendants.

The district court held that the Idaho contacts of Rowland, Hudd and James were sufficient to find that they purposefully availed themselves of the Idaho forum. With respect to Moran and Inoco, the court found that, although they were not alleged to have taken actions directed at Idaho, the allegations of conspiracy were sufficient to satisfy the purposeful availment test. Parsing the controlling factors, the court concluded that the exercise of specific personal jurisdiction over the defendants under the Idaho long-arm statute would not be unreasonable and held them subject to personal jurisdiction on all claims other than the contract claim. We affirm, but on a different ground.

III. Standard of Review

We review the district court's dismissal for lack of personal jurisdiction de novo. Oneluk v. Langsten Slip & Batbyggeri A/S, 52 F.3d 267, 269 (9th Cir. 1995). Factual findings underlying the judgment are reviewed for clear error. Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 78 n.2 (9th Cir. 1987). Plaintiffs have the burden of establishing personal jurisdiction but need to make only a prima facie showing of jurisdictional facts to avoid a motion to dismiss. Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990). All factual disputes are resolved in favor of the Trust. Lake v. Lake, 817 F.2d 1416, 1420 (9th Cir. 1987).

IV. Personal Jurisdiction under Bankruptcy Rule 7004(f)

A. Application of the Rule to the Pending Action

In 1994, when the Trustees commenced this action, Fed. R. Bankr. P. 7004(g) incorporated Fed. R. Civ. P. 4 "in effect on January 1, 1990, notwithstanding any amendment . . . subsequent thereto." Rule 4, as of 1990, did not authorize personal jurisdiction over nonresidents on the basis of national contacts, in the absence of statutory authority. The rule was

amended, however, effective December 1, 1996.[1] The amendment added a new Rule 7004(f), which incorporates Rule 4 without any limitation. Rule 4 in turn had been amended in 1993 by the addition of Rule 4(k)(2) which provides:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2). Thus, so long as the exercise of jurisdiction is consistent with the Constitution, personal jurisdiction may be obtained over nonresidents sued on a federal claim who are served in conformity with Bankruptcy Rule 7004(a) and Fed. R. Civ. P. 4(f). See Fed. R. Civ. P. 4(k)(2) advisory committee's note (1993 Amendments) (stating that the rule authorizes "jurisdiction over the person of any defendant against whom is made a claim arising under any federal law if that person is subject to personal jurisdiction in no state.").

The threshold questions is whether the new Rule 7004(f) may be applied to an action commenced in 1994. The Supreme Court's order adopting the amended rules states that they should "govern all proceedings . . . thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy then pending." Communication from the Chief Justice, Amendments to the Federal Rules of Bankruptcy Procedure that Have Been Adopted by the Court, at 2, Apr. 24, 1996 (emphasis added). Application of the rule to this action therefore turns on whether it would be just and practicable. While in some circumstances we would remand so that the district court may exercise its discretion, we see no need to do so here. Remand is not necessary where the issue has been

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[1] The district court took note of the forthcoming amendment but its order was issued before the effective date of the amendment.

fully briefed on appeal, the record is clear and remand would "impose needless additional expense and delay. . . ." Foster v. Skinner, 70 F.3d 1084, 1089 (9th Cir. 1995) (citing Roundtree v. United States, 40 F.3d 1036, 1040 (9th Cir. 1994)); Hoffman v. CMAC, 814 F.2d 1385, 1387 (9th Cir. 1987).

This appeal is interlocutory and is limited to the issue of personal jurisdiction. Both sides have thoroughly briefed the issue, and applying the rule to this action is plainly practicable. Defendants argue, however, that to do so would be prejudicial because the claims against them would otherwise be barred by the prior rule. Their reliance on Chenault v. USPS, 37 F.3d 535 (9th Cir. 1994), is misplaced. We held there that a newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought "because to do so would be manifestly unjust." Id. at 539. This clearly is not such a case. As the Supreme Court stated in Landgraf v. USI Film Products, 511 U.S. 244, 274 (1994), "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. . . . Present law normally governs such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.' " See also Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996) (stating that "the 'presumption against retroactive application of new legislation to pending cases . . . does not apply to rules conferring or withdrawing jurisdiction.' " (citation omitted)); Arrowhead Estates Dev. Co. v. United States Trustee, 42 F.3d 1306, 1311 (9th Cir. 1994) (same); Priel v. Cessna Aircraft Co., 751 F.2d 1037, 1039 (9th Cir. 1985) (stating that "when a statute is addressed to remedies or procedures and does not otherwise alter substantive rights, it will be applied to pending cases"); see also Driscoll v. Gebert, 458 F.2d 421 (9th Cir. 1972) (holding that newly enacted California long-arm statute applied to previously filed pending action).

Defendants' argument that they could not reasonably have expected being haled into court in Idaho is unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors. None of the defendants offer facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced. See McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957) (stating that defendant "had no vested right not to be sued in California."). Weighing against defendants' arguments, moreover, is the policy favoring, in the interest of economy and efficiency, consolidation in a common forum of all litigation relating to a bankruptcy—as opposed to having it dispersed across two continents.[2]

B. Applicability of the Rule

All of the requisite elements of Rule 4(k)(2) are present and not contested, except for Inoco's contention that it lacks sufficient contacts with the United States. The complaint alleges claims arising under federal law (11 U.S.C. §§ 544, 548 and 550), and defendants' position is that they are not subject to the jurisdiction of Idaho (and, so far as appears in the record, of any other state). The Rowland Directors do not challenge the constitutional basis for personal jurisdiction over them in the United States. With respect to their contacts and those of Inoco with the United States, the bankruptcy judge's findings are compelling:

> Thus, these alien defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf

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[2] Inoco argues that even if the rule applied to this action, it could not retroactively validate service that was invalid when made. Inoco's argument confuses the effect of a change in the rule governing the procedure for making service, which might not apply to service previously completed, with a change in the rule determining the presence of personal jurisdiction. As we have said, it is the law in effect at the time of the decision that normally governs the latter determination.

> injury in the United States where it was located. . . . [T]he alleged injuries arise out of the defendants' purposeful direction of their activities toward the United States. . . .
>
> * * *
>
> Inoco's sale of property located in Texas and New York to Gulf was activity directed to the United States . . . As part of the conspiracy to loot Gulf, Inoco took control of a United States corporation. . . . Inoco purposefully interjected itself into the United States.

V. Service on Rowland

Rowland contends that he was not properly served under pre-amendment Bankruptcy Rule 7004(c). That rule states that for service in a foreign country, "[t]he summons and complaint . . . may be served as provided in Rule 4(d)(1) and (d)(3) . . . ." (emphasis added). Rowland was served instead pursuant to Rule 4(l). That rule, as it was in 1990, contained "Alternative Provisions for Service in a Foreign Country," and stated that a defendant in a foreign country may be served by any one of five specified methods. Rule 7004(a) further stated that Rule 4(i) applied in adversary proceedings. The district court correctly held the service under Rule 4(i) to be sufficient. Its ruling was consistent with that of other courts, finding Rule 7004(e) to be permissive, not mandatory. See Schwinn Plan. Comm. v. AFS Cycle & Co., 190 B.R. 599, 608 (Bankr. N.D. Ill. 1995); Official Comm. of Unsecured Creditors of Southold Dev. Corp. v. Mittemyer, 148 B.R. 726, 728 (Bankr. E.D.N.Y. 1992); In re Crysen/Montenay Energy Co. v. E & C Trading Ltd., 166 B.R. 546, 548-49 (Bankr. S.D.N.Y. 1994).

CONCLUSION

The order of the district court is AFFIRMED and the matter is REMANDED for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-80357

DC# CV-96-10-EJL
Idaho (Boise)

Filed October 11, 1996

In re PINTLAR CORPORATION and
GULF USA CORPORATION,

Debtors.

BERNARD GOODSON, FORD ELSAESSER,
LOWELL FINLEY, and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Respondents,

—VS.—

DAVID J. ROWLAND, *et al.*

Defendants.

DAVID J. ROWLAND, JEREMY E. JAMES,
DAVID L. HUDD and DEREK J. MORAN,

Defendants-Petitioners.

ORDER

Before: BEEZER and KOZINSKI, *Circuit Judges*

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. Within 10 days from the date of this order, petitioner shall perfect the appeal pursuant to Fed. R. App. P. 5(d).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-80368

DC# CV-96-10-EJL
Idaho (Boise)

Filed October 11, 1996

In re PINTLAR CORPORATION and
GULF USA CORPORATION,

Debtors.

BERNARD GOODSON, FORD ELSAESSER,
LOWELL FINLEY, and JAY J. MILLER, as TRUSTEES,

Plaintiffs-Respondents,

—VS.—

DAVID J. ROWLAND, *et al.*

Defendants.

INOCO PLC,

Defendant-Petitioner.

ORDER

Before: BEEZER and KOZINSKI, *Circuit Judges*

The petition for permission to appeal under 28 U.S.C. § 1292(b) is granted. Within 10 days from the date of this order, petitioner shall perfect the appeal pursuant to Fed. R. App. P. 5(d).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Bk. Case Nos. 93-02986, 93-02987

Adv. Case No. 94-6016

Case No. CV 96-0~~11~~10-N-EJL

In re: PINTLAR CORPORATION and
GULF USA CORPORATION,

Debtors.

BERNARD GOODSON, FORD ELSAESSER,
LOWELL FINLEY, and JAY J. MILLER, as Trustees,

Plaintiffs/Appellees,

—VS.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LWRENCED R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK ZURICH, A.G. (formerly known as INTERALLIANZ BANK ZURICH, A.G. INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS

LTD., PORTFOLIO MANAGEMENT LIMITED, FELPARK LIMITED (formerly known as SINO INFOMATION SERVICES LIMITED), FERRIS INVESTMENTS LIMITED and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

INOCO PLC., DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Defendants/Appellants.

Filed September 16, 1996

ORDER

Pursuant to 28 U.S.C. § 1292(b), appellants-defendants David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran, and appellant-defendant Inoco Plc, move the court for an order certifying for appeal to the Court of Appeals for the Ninth Circuit this court's Memorandum Decision and Order dated August 16, 1996 (the "Order"). Plaintiffs-appellees oppose the motions.

After careful consideration, the court concludes that issues regarding the legal standards governing the requisite jurisdictional contacts of a foreign defendant, and the extend to which such contacts may be imputed to other defendants, involve controlling questions of law as to which there is a substantial ground for a difference of opinion. *Cf., e.g., Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, No. 94-16368, slip op. 10797 (9th Cir. Aug. 28, 1996); *Underwager v. Channel 9 Australia*, 69 F.3d 361 (9th Cir. 1995); *Ziegler v. Indian River Country*, 64 F.3d 470 (9th Cir. 1995); *Sher v. Johnson*, 911 F.2d 1357 (9th Cir. 1990). The court also con-

cludes that an immediate determination of these issues will materially advance the ultimate termination of the litigation. Accordingly, the court will grant the motions.

ORDER

Based on the foregoing, and being otherwise fully advised in the premises, the court HEREBY ORDERS that the this court's Memorandum Decision and Order dated August 16, 1996, be and hereby is amended to include the following statement certifying the Order for interlocutory appeal to the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1292(b):

> This Order involves controlling questions of law as to which there are substantial grounds for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation.

Accordingly this Order is certified pursuant to 28 U.S.C. § 1292(b) for interlocutory appeal to the United States Court of Appeals for the Ninth Circuit. Dated this 13th day of September, 1996.

EDWARD J. LODGE
Edward J. Lodge
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Bk. Case Nos. 93-02986
93-02987
Adv. Case No. 94-6016
Case No. CV 96-010-N-EJL

In re: PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

BERNARD GOODSON, FORD ELSAESSAR, LOWELL FINLEY, and JAY J. MILLER, as TRUSTEES,

Plaintiffs/Appellees,

—vs.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LWRENCED R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK ZURICH, A.G. (formerly known as INTERALLIANZ BANK ZURICH, A.G. INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS

LTD, PORTFOLIO MANAGEMENT LIMITED, FELPARK LIMITED (formerly known as SINO INFORMATION SERVICES LIMITED), FERRIS INVESTMENTS LIMITED and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

INOCO PLC., DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Defendants/Appellants.

Decided August 16, 1996

MEMORANDUM DECISION AND ORDER

OVERVIEW

Defendants David J. Rowland, Jeremy E. James, David L. Hudd, Derek L. Moran (collectively, the "Rowland Directors"), and Inoco Plc ("Inoco") appeal the interlocutory order of the bankruptcy court denying their motions to dismiss for lack of personal jurisdiction and improper service of process the adversary action brought by trustees of a litigation trust ("the Trustees") to recover certain assets belonging to debtors Gulf USA Corporation ("Gulf") and Pintlar Corporation ("Pintlar"). The Trustees, in turn, cross-appeal the bankruptcy court's decision to dismiss for lack of personal jurisdiction the Trustees' claim alleging breach of fiduciary duties, corporate waste and mismanagement. The court affirms in part, reverses in part and remands.[1]

[1] The court finds that the facts and legal arguments are adequately presented in the briefs and record, and that therefore oral argument would not aid in the resolution of the issues presented by this appeal. Fed. R. Bankr. P. 8012.

BACKGROUND

1. Parties

Defendants Rowland, James, Hudd and Moran are foreign citizens who reside outside the United States. Defendant Inoco is a publicly traded United Kingdom corporation, headquartered in England. At all times relevant to this action, Rowland, Hudd, James and Moran were officers of Inoco, and Rowland, through a corporate intermediate, owned a controlling interest in Inoco. During the same time period, Gulf was headquartered first in Boston, Massachusetts, and then in Washington, D.C.

The Rowland Directors gained control of Gulf in the spring of 1989, when Downshire, N.V., a wholly owned subsidiary of Inoco, purchased 34% of Gulf's outstanding shares from David and Frederick Barclay. At the time of the purchase, Gulf had accumulated substantial assets totaling over $177 million. This is despite the fact that by 1989 Gulf also had incurred potentially enormous debts and liabilities. The bulk of Gulf's liabilities grew out of the former ownership of the Bunker Hill Mine by Gulf's wholly owned subsidiary, Pintlar.[2] The Bunker Hill Mine is located in the State of Idaho.

Although Pintlar sold the Bunker Hill Mine in 1982, Gulf remains responsible for many of the obligations incurred by Pintlar prior to divestment of the mining operation. First, and foremost, Gulf has been identified by the Environmental Protection Agency ("the EPA") as a potentially responsible party for the extensive environmental damage that occurred as a result of the company's mining operations. In this regard, Gulf's creditors include the EPA, the State of Idaho, and the Coeur d'Alene Indian Tribe (the "environmental creditors"). Gulf's creditors also include retired employees of the Bunker Hill Mine who are entitled to medical and pension benefits (the "retirees"). Finally, Gulf remains indebted to certain public bondholders and other unsecured creditors. All of the above

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[2] Pintlar's principal place of business is in Kellogg, Idaho.

named creditors are beneficiaries of the litigation trust, and it is on their behalf that the Trustees bring this adversary action.

2. Trustees' Allegations[3]

In their written submissions, the Trustees allege that after taking control of Gulf, the Rowland Directors and Inoco purposely engaged in a course of action designed to loot and waste the assets of the company. According to the Trustees, Gulf was purchased precisely for this purpose. And, as proof of this allegation, the Trustees point out that during negotiations for the purchase of Gulf, an investigation of Rowland, commissioned by Gulf's Board of Directors ("Board"), characterized Rowland as having a "clear history of related-party transactions" and an "uneven past." In light of this information, before the Board would approve the proposed sale, it required Rowland, Hudd, James, Moran and Inoco to enter into a "Standstill Agreement" with the Barclays and Gulf. The agreement placed certain restrictions on the ability of an officer, director or stockholder to enter into a business transaction with Gulf, or make an unauthorized business commitment on behalf of the company.

The Trustees allege that after the purchase of Gulf was completed in March of 1989, and the Rowland Directors were installed as controlling members of the Board,[4] the defendants ignored the Standstill Agreement and entered into a series of transactions that transferred Gulf's assets into their own pockets. For instance, in the fall of 1989 and spring of 1990, the Rowland Directors are alleged to have caused Gulf to buy cer-

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[3] As explained more fully below, when determining whether the plaintiffs have carried their burden to establish that personal jurisdiction is appropriate, the court assumes that the facts set forth in the plaintiffs' written submissions are true. *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

[4] Besides serving on Gulf's Board of Directors, several of the defendants acted as officers of the company. In September of 1989, Rowland became President and Chief Executive Officer; James and Hudd became Executive Vice-Presidents; and Moran became Senior Vice-President.

tain New Zealand real estate in a complicated scheme that resulted in the diversion of millions of dollars of company funds to the defendants and their associates.[5]

When the New Zealand transactions became public, many of the company's creditors became concerned that Gulf would not be able to meet its obligations. Several Idaho newspapers ran articles discussing Gulf's activities in New Zealand and the possible effect of the transactions on the company's Idaho creditors. On September 17, 1990, Gulf released a letter, signed by Rowland, and addressed to former employees of the Bunker Hill Mine and their families, assuring the families that the New Zealand transactions would not prevent the company from meeting its obligations to its former employees or its responsibilities to the EPA and the State of Idaho for the environmental clean-up of the former mining site. The trustees allege that the letter's assurances were false and were made in an effort to cover-up the illicit transfers of Gulf's assets.

The Trustees also allege that while the defendants were engaged in various schemes to siphon-off Gulf's assets for their personal use, Hudd and James were meeting with H.P. Harbert, then President of Pintlar, in an effort to sidetrack the environmental creditors. To this end, Hudd attended at least nine meetings in Idaho, and James attended one Idaho meeting, to prepare for negotiations with the environmental creditors. In addition, Hudd participated with Harbert in at least eighteen phone calls, to and from Idaho, to discuss Gulf's environmental problems and, at Hudd's request, Harbert sent to Hudd Idaho newspaper articles reporting Gulf's responses to its environmental obligations. Harbert states that Hudd and James directed him to implement strategies which he believes had the purpose of delaying any action by the creditors.[6]

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[5] The New Zealand transactions are but one example of the alleged efforts by the Rowland Directors and Inoco to loot and waste Gulf's assets. A complete rendition of the Trustees' allegations are recounted in the bankruptcy court's Memorandum of Decision, Tab 67 at 11-26.

[6] After the bankruptcy court issued its decision, Harbert submitted a supplemental affidavit wherein he withdrew his prior statement that

In mid-1991, the Rowland Directors arranged for the sale of Inoco and Downshire's shares in Gulf to Nycal Corporation. Shortly after the sale was completed, Gulf's new owners discovered several improprieties related to the transactions initiated and carried out by the Rowland Directors during their tenure. The new owners and the defendants eventually entered into a settlement agreement resolving the discovered improprieties. As part of that settlement, the Rowland Directors and Inoco were released from any potential future liabilities based on their ownership and/or management of Gulf and its subsidiaries.

PRIOR PROCEEDINGS

1. Claims

In October of 1993, involuntary bankruptcy petitions were filed against both Gulf and Pintlar in the Bankruptcy Court for the District of Idaho. This adversary action is an outgrowth of those bankruptcy proceedings.

The Trustees seek to recover, for the benefit of the litigation trust, assets of Gulf and Pintlar which they claim were looted by the defendants. The Trustees assert that at all times, each defendant that is the subject of this appeal acted in concert with, and as an agent for, all other defendants in a general conspiracy to "loot and wastes" Gulf's assets. In their amended complaint, the Trustees base their right to relief on several discrete causes of action. Against defendants Rowland, Hudd, James, Moran and Inoco, the Trustees seek the recovery of the transferred property and/or damages based on theories of 1) fraudulent conveyances; 2) breach of fiduciary duties, corporate waste and mismanagement; 3) misrepresentation; 4) civil conspiracy; and 5) breach of contract.

Hudd had attended a meeting with then Governor Andrus. Tab 83 at 2-3. In the supplemental affidavit, Harbert also corrected the place and dates of the meetings that James attended. *Id.* These admitted errors by Harbert are not grounds for discounting his remaining declarations.

2. Motions to Dismiss

The defendants moved the bankruptcy court for dismissal of the Trustees' action for lack of personal jurisdiction and improper service of process. In a 121-page Memorandum of Decision, the bankruptcy court granted the defendants' motions to dismiss for lack of personal jurisdiction the count alleging breach of fiduciary duties, corporate waste and mismanagement, but denied the defendants' motions with respect to all other counts. The bankruptcy court also denied the motions of Hudd, James and Moran to quash service. Rowland's motion to quash service was granted in part and continued in part.

Following the bankruptcy court's entry of judgment, the Rowland Directors and Inoco each filed a motion with this court for leave to file an interlocutory appeal. Relying on 28 U.S.C. § 158(a), and employing the standard set forth in 28 U.S.C. § 1292(b), the court granted the defendants' motions.[7] The appeals were then consolidated and briefing followed. With the submission of all the parties' filings complete, the court rules as follows.

DISCUSSION

1. Standard of Review

Where, as here, the personal jurisdiction determination is made on the basis of written submissions, the Trustees need only make a prima facie showing of jurisdictional facts to avoid the defendants' motions to dismiss. *Data Disc, Inc. v Systems Technology Assocs., Inc.*, 557 F.2d 1280, 1284-85 (9th Cir. 1977). The court reviews the materials presented to the bankruptcy court de novo to determine whether the

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[7] For purposes of this appeal, the court assumes, as did the bankruptcy court below, that each claim asserted in the amended complaint either is a "core proceeding" or, at a minimum, is related to the underlying bankruptcy cases. *See Diamond Mortgage Corp. v. Sugar*, 913 F.2d 1233, 1237-39 (7th Cir. 1990), *cert. denied*, 498 U.S. 1089 (1991).

Trustees have met their burden. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987). Because the bankruptcy court did not hold an evidentiary hearing, and thus did not reach issues of credibility, all factual disputes are resolved in the Trustees favor. *Id.*; *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990); *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1064 n.1 (9th Cir. 1990).

2. Personal Jurisdiction Requirements

Before a court may properly exercise personal jurisdiction over a nonresident defendant, it must be satisfied that two independent requirements have been met: first, that an applicable rule or statute affirmatively authorizes the assertion of personal jurisdiction over the defendant, and second, that the assertion of such jurisdiction "accords with constitutional principles of due process." *Data Disc, Inc.*, 557 F.2d at 1285; *Petrik v. Public Serv. Mut. Ins. Co.*, 879 F.2d 682, 684 (9th Cir. 1989). Although the two requirements are independent, they are often interrelated. For example, where federal subject matter jurisdiction is predicated on diversity, Rule 4 of the Federal Rules of Civil Procedure incorporates the state's long-arm statute as the authorizing source for service of process. In such a case, the defendant's amenability to suit in federal district court is limited by the state's rule or statute. Because a state's ability to authorize service of process is restricted by the due process clause to cases in which the defendant has certain minimum contacts with the state, a federal district court sitting in diversity will analyze the due process inquiry by assessing the defendant's contacts with the forum state. *Neaves*, 912 F.2d at 1065; *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986).

In contrast, where the federal court's subject matter jurisdiction is predicated on a federal question *and* service is accomplished pursuant to a federal law authorizing nationwide or worldwide service of process, and not by reference to the state's long-arm statute, the court is no longer restricted by the due process limitations inherent to a state's autho-

rization of service. *Go-Video, Inc. v. Akai Elec. Co., Ltd.*, 885 F.2d 1406, 1414-15 (9th Cir. 1989); *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985). Under these circumstances, then, due process concerns may be satisfied by a determination that the defendant has sufficient contacts with the United States as a whole. *Go-Video, Inc.*, 885 F.2d at 1414-16; *Vigman*, 764 F.2d at 1315-16; *Kramer Motors, Inc. v. British Leyland Ltd.*, 628 F.2d 1175, 1177 (9th Cir.), *cert. denied*, 449 U.S. 1062 (1980).

The more difficult case, and a potential issue here, occurs when the federal court's jurisdiction is based on a federal question *but* incorporation of the state's long-arm statute provides the only authorizing source of service. The Trustees argue, and the bankruptcy court concluded, that in such a situation, the due process analysis should not be limited to a consideration of the defendants' contacts with the forum state, but instead, should be expanded to consider the defendants' "aggregated national contacts." This conclusion, however, has not been accepted by the vast majority of courts addressing the question, and more importantly, has not been accepted by the Ninth Circuit.

Courts have recognized the "anomalous situation" created by a "federal court in a nondiversity case being limited by due process restrictions imposed on the states by the fourteenth amendment as opposed to those imposed on the federal government by the fifth amendment." *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 284 (3rd Cir.), *cert. denied*, 454 U.S. 1085 (1981). Nonetheless, they have generally concluded that "it would be equally anomalous to utilize a state long-arm rule to authorize service of process on a defendant in a manner that the state body enacting the rule could not constitutionally authorize." *Id.* Accordingly, in a suit involving a federal question, where the absence of a federal service of process statute requires the use of the state's long-arm statute, the cases direct the federal district court to make the due process determination by assessing the defendant's contacts with the forum state. *Id.* at 283-84; *accord Cable/Home Commu-*

nication Corp. v. Network Prods., Inc., 902 F.2d 829, 855-56 (11th Cir. 1990); *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 422-27 (5th Cir. 1986) (en banc), *aff'd*, 484 U.S. 97 (1987); *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 294-97 (3rd Cir.), *cert. denied*, 474 U.S. 980 (1985); *Johnson Creative Arts, Inc. v. Wool Masters, Inc.*, 743 F.2d 947, 950 (1st Cir. 1984); *Textor v. Board of Regents of N. Ill. Univ.*, 711 F.2d 1387, 1392 (7th Cir. 1983). *But see Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d 1265, 1268-72 (6th Cir. 1984) (applying a less demanding due process inquiry where subject matter jurisdiction is predicated on federal law); *United Rope Distrib., Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532, 534-36 (7th Cir. 1991) (noting that the panel's "sympathies" lie with *Handley*).

Consistent with the majority rule, the Ninth Circuit has, in cases where service is accomplished by reference to the state's long-arm statute, required that due process be satisfied by a review of the defendant's contacts with the forum state, regardless of the fact that a federal question is in issue. *See, e.g., Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 414-19 (9th Cir. 1977) (declining to apply a "aggregated national contacts" test in suit brought pursuant to the Lanham Act where service of process was accomplished under the state's long-arm statute); *Pacific Atlantic Trading Co., Inc. v. M/V Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985) (citing *DeJames*, 654 F.2d at 283, and holding that in an admiralty case, where service is accomplished pursuant to the state's long-arm statute, due process requires that the defendant have certain minimum contacts with the forum state); *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 312-13 (9th Cir. 1987) (analyzing defendant's contact with forum state in ERISA action); *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 587-88 (9th Cir. 1993) (analyzing defendant's contact with forum state in federal copyright action); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (analyzing defendants contact with forum state in federal antitrust action); *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1393-

94 & n.7 (9th Cir.) (analyzing defendant's contact with forum state in Lanham Act action), *cert. denied*, 116 S. Ct. 276 (1995).[8]

Moreover, as one Ninth Circuit opinion noted, "a recent Supreme Court decision implies that a national [or worldwide] service provision is a necessary prerequisite for a court even to consider a national contacts approach." *Go-Video, Inc.*, 885 F.2d at 1416 (citing *Omni Capital Int'l v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104-05 & n.5 (1987)). Thus, even though the present action involves a federal question, the determination of whether personal jurisdiction "accords with constitutional principles of due process," turns in large part on whether the "applicable rule or statute" that affirmatively authorizes service on the foreign-based defendants is a federal law or, instead, the state's long-arm statute. Accordingly, the court first addresses this issue.

a. Applicable Rule or Statute

In all instances, the service of the summons and complaint on the defendants bringing this appeal occurred outside the United States. The current version of the Federal Rules of Bankruptcy Procedure provides for service on any person in

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[8] The Trustees contend that in *Ballard v. Savage*, 65 F.3d 1495 (9th Cir. 1995), the Ninth Circuit adopted an "aggregated national contacts" test for cases that involve a federal question. The *Ballard* court inexplicably failed to identify the source of the court's subject matter jurisdiction or the statute authorizing service. There is no way of knowing, therefore, if the case involved a federal question and, if so, whether service was made pursuant to federal law or the state's long-arm statute. The defendants have submitted a copy of the complaint filed in the underlying district court case, which suggests that service occurred under a federal statute allowing worldwide service of process. If this is so, *Ballard* falls in line with other Ninth Circuit decisions, such as *Go-Video*, that permit the use of the national contacts test when service is accomplished pursuant to a federal law authorizing nationwide or worldwide service of process. 885 F.2d at 1413-16. In any event, when a federal district court is forced to look outside the circuit court's discussion in order to divine the meaning of the opinion, the decision ceases to act as a meaningful source of guidance and cannot serve as binding precedent.

a foreign country that is "authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P." Fed. R. Bankr. P. 7004(e). Bankruptcy Rule 7004(g) incorporates the version of Rule 4 of the Federal Rules of Civil Procedure (hereinafter "Rule 4") in effect on January 1, 1990, "notwithstanding any amendment to Rule 4 F.R.Civ.P. subsequent thereto."[9]

The version of Rule 4(e) in effect on January 1, 1990, permits service on a party not an inhabitant of or found within the state which the district court is held, "[w]henever a statute of the United States or an order thereunder provides for service of a summons," or "[w]henever a statute or rule of court of the state in which the district court is held provides . . . for service of a summons." Similarly, Rule 4(c)(2)(C)(i) allows service upon a party not found within the state whenever a summons and complaint may be served upon a defendant "pursuant to the law of the State."

Taken together, the applicable rules permit the bankruptcy court to exercise jurisdiction over a alien defendant residing outside the United States only when a federal statute or order, or a state statute, rule or law, authorizes service in a foreign country. The Trustees argue that in this case, service was properly accomplished under a *federal* statute or order referred to by Rule 4(e). The Trustees contend that Rule 4(e) can be read to refer to Bankruptcy Rule 7004(d), which authorizes nationwide service of process, and that in conjunction with Federal Rule of Civil Procedure 4(i)(1), which sets forth an alternative manner for service in a foreign country, service upon the defendants was properly accomplished pursuant to a federal law that authorizes worldwide service of process.

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[9] A substantially revised version of the Federal Rules of Civil Procedure became effective December 1, 1993. Rule 4 was amended to expressly permit the exercise of personal jurisdiction over an individual in a foreign country. Fed. R. Civ. P. 4(f), (k)(2). As explained above, this amended version does not presently apply to bankruptcy cases, although a proposed amendment of Bankruptcy Rule 7004, due to take effect December 1, 1996, will, *inter alia*, incorporate the current version of Rule 4.

The Trustees' argument is bolstered somewhat by the Eleventh Circuit case *Nordberg v. Granfinanciera (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1344 (11th Cir. 1988), *rev'd on other grounds*, 492 U.S. 33 (1989), in which the court seems to conclude that the authorization of nationwide service by Bankruptcy Rule 7004(d) somehow also permits worldwide service. The *Nordberg* court reached its conclusion with little analysis, and its decision has not been well received. *See, e.g., In re Old Elec. Inc.*, 142 B.R. 189, 190-92 (Bankr. N.D. Ohio 1992).

This court also rejects *Nordberg*, and refuses the Trustees' invitation to adopt the tortured construction they suggest. Even assuming, *arguendo*, that Bankruptcy Rule 7004(d) is a statue or order within the meaning of Rule 4(e), its authorization allows *nationwide*, not worldwide, service of process. And Rule 4(i)(1) is not a proper source of authorization as that provision is expressly limited by its own terms to the manner of service. *Wells Fargo & Co.*, 556 F.2d at 414; *In re Old Elec. Inc.*, 142 B.R. at 191-92. In sum, after careful consideration, the court concludes that no federal statute or order provides authorization for the assertion of personal jurisdiction over the foreign-based defendants and service must be accomplished, if at all, pursuant to the applicable state long-arm statute as provided for by Rule 4(e) and/or Rule 4(c)(2)(C)(i).[10]

b. Idaho's Long-Arm Statute[11]

Under Idaho's long-arm statute a person is subject to personal jurisdiction "if, among other things, he transacts busi-

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[10] The similarities between Rule 4(e) and Rule 4(c)(2)(C)(i) result in an identical analysis under either rule. *Kina v. McAllister Bros., Inc.*, 659 F. Supp. 39, 41-42 & n. 1 (S.D. Ala. 1987).

[11] The face that Bankruptcy Rule 7004(d) authorizes nationwide service, and that a national contacts test could be employed if the defendants had been properly served in the United States, may make the analysis of the defendants' contacts with Idaho under that state's long-arm statute seem somewhat incongruous. An inverse, but equally inconsistent result, is obtained under the current version of Rule 4. *L.H.*

ness or commits a tortuous act in Idaho and the alleged cause of action arises from that transaction or act." *Lake*, 817 F.2d at 1420 (citing Idaho Code § 5-514). However, because the Idaho legislature "intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution," the question of whether personal jurisdiction is appropriate under the Idaho statute can be answered by deciding whether the exercise of jurisdiction over the defendants "accords with constitutional principles of due process." *Id.* (citing *Doggett v. Electronics Corp. of Am.*, 454 P.2d 63, 67 (Idaho 1969).[12]

3. Due Process Requirements

Consistent with due process principles, a state may assert either general or specific jurisdiction over a nonresident defendant. *Ziegler v. Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995); *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986). Here, the Trustees do not argue that the defendants are subject to general jurisdiction. Accordingly, jurisdiction is only proper in this case if the defendants' forum-related activities gave rise to the claims asserted against them by the Trustees. *Haisten*, 784 F.2d at 1397 (defining specific jurisdiction). To help

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Carbide Corp. v. Piece Maker Co., 852 F. Supp. 1425, 1428-32 (N.D. Ind. 1994) (noting that in a patent case, under current version of Rule 4, national contacts tests may be used when nonresident alien is served in a foreign country, but not when service is accomplished in the United States pursuant to a state's long-arm statute). As has often been stated, anomalies of this sort are for Congress to correct. *Omni Capital Int'l*, 484 U.S. at 413.

[12] The parties in their briefing, and the bankruptcy court in its decision, spend a considerable amount of effort discussing state court decisions construing the state's long-arm statute. the interpretation of a state statute is, of course, a matter of state law. However, in *Lake v. Lake*, 817 F.2d at 1420, the Ninth Circuit conclusively determined the scope of the state's long-arm statute as construed by the Idaho Supreme Court. Absent an intervening change in state law, not present here, the *Lake* decision is binding on the lower federal courts. *Cf. In re Visness*, 57 F.3d 775, 778 (9th Cir. 1995), *cert denied*, 116 S. Ct. 828 (1996).

the courts determine whether specific jurisdiction is present, the Ninth Circuit has articulated a three-part test: (1) the non-resident defendants must have purposefully availed themselves of the privilege of conducting activities in Idaho, thereby invoking the benefits and protections of the state's laws; (2) the claims must arise out of the defendants' state-related activities; and (3) the exercise of jurisdiction must be reasonable. *Ziegler,* 64 F.3d at 473; *Lake,* 817 F.2d at 1421.

a. Purposeful Availment

When conducting the purposeful availment analysis, the court must be careful to distinguish between claims sounding in tort and those based on a breach of contract. *Ziegler*, 64 F.3d at 473; *Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991). Where tort, and tort-like, claims are in issue, the purposeful availment prong may be satisfied by showing the defendant's efforts were intentionally directed toward the forum state residents. *Hirsch v. Blue Cross, Blue Shield*, 800 F.2d 1474, 1478 (9th Cir. 1986); *Lake,* 817 F.2d at 1421. Actual physical contact with the forum state is not necessary, and personal jurisdiction may be exercised over a defendant "whose only 'contact' with the foreign state is the 'purposeful direction' of a foreign act having effect in the forum state." *Haisten*, 784 F.2d at 1397, 1399; *Lake*, 817 F.2d at 1423; *Neaves*, 912 F.2d at 1065. Relying on the above principles, the Ninth Circuit has reduced the purposeful availment inquiry in tort cases to a minimum of three elements: "(1) intentional action; (2) aimed at the forum state; and (3) causing harm that the defendant should have anticipated would be suffered in the forum state." *Ziegler*, 64 F.3d at 474.

Although contending throughout that the present action is all about a general conspiracy to "loot and waste, Gulf's assets, the Trustees' amended complaint asserts several discrete causes of action against the defendants that are tort, or tortlike, claims. These claims include the count alleging fraudulent conveyances of funds or property ("count I"); the count alleging breach of fiduciary duties, corporate waste and

mismanagement ("count II"); the count alleging misrepresentation ("count III"); the count alleging a civil conspiracy ("count V"); and the count seeking to avoid fraudulently procured releases ("count IX"). The bankruptcy court distinguished between the corporate waste and mismanagement count and all other tort counts, on the basis that such a claim is grounded on negligent, rather than intentional, conduct. The court disagrees.

As set forth in the complaint and other written submissions, the Trustees allege that the defendants breached their fiduciary duties, and committed corporate waste and mismanagement, by "using their positions of trust and confidence to further their private interests," instead of acting in the best interest of Gulf and its creditors. In this regard, the Trustees' claim is based on the defendants' alleged willful self-dealing and conflict of interests. The court sees no reason to treat this count differently than the other tort claims.

The Trustees' also assert a claim alleging breach of contract ("count VI"). Ninth Circuit case law requires the court to subject the breach of contract count to a somewhat stricter standard than that employed to test the tort claims. *Roth*, 942 F.2d at 621-22. To satisfy the purposeful availment prong, the Trustees must show a significant nexus between the defendants' contacts with the forum state and the formation of the contractual relationship. *Id.*

(1) Rowland

Assuming, as it must, that the allegations contained in the Trustees' written submissions are true, the court has no trouble concluding that Rowland intentionally directed his actions into Idaho, knowing that the brunt of the injuries alleged in the tort counts would fall on the resident creditors. Allegedly, Rowland purposefully directed his letter to the former employees of the Bunker Hill Mine to placate Idaho creditors, including the retirees and the environmental creditors. Thus, by furthering the deceptions necessary to complete the torts committed by the defendants, Rowland intended for the let-

ter's alleged misrepresentations to have effect in the forum state. *Cf. Lake*, 817 F.2d at 1423 (nonresident attorney who "directed" a California ex parte order at Idaho is subject to personal jurisdiction in that state); *Neaves*, 912 F.2d at 1065 (nonresident defendant who mailed fraudulent information to forum state resident is subject to personal jurisdiction in that state).

On the other hand, Rowland's contacts with Idaho appear unrelated to the Trustees' breach of contract claim in count VI. That claim is concerned with the defendants' alleged failure to abide by the Standstill Agreement. The agreement was negotiated and entered into outside of Idaho, between parties who were not Idaho residents, and the agreement created no continuing relationship with the forum state. *See Roth*, 942 F.2d at 622. Under the Ninth Circuit's purposeful availment test for analyzing contract claims, jurisdiction is not appropriate on count VI.[13]

(2) Hudd

Similar to Rowland, Hudd's alleged effort to conceal the defendants' illicit transfers was intentionally directed at the environmental creditors through delay tactics implemented at various meetings held in Idaho. The Trustees allege that Hudd sought to stall Idaho creditors until the defendants could safely abscond with Gulf's assets. The alleged wrongful conduct was aimed at Idaho and was intended to be felt in the forum state. Therefore, Hudd, like Rowland, purposefully availed himself of the privilege of conducting activities in the state of Idaho.

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[13] The Trustees ask the court to exercise "pendent personal jurisdiction" over any claim that cannot stand by itself. The Ninth Circuit has never adopted the doctrine, *Data Disc, Inc.*, 557 F.2d at 1289 n.8, and a recent Supreme Court's decision, *Omni Capital Int'l*, 484 U.S. at 108-111, appears to foreclose this avenue. The court therefore rejects the Trustees' request.

However, as discussed above, Hudd's activity in Idaho is not sufficient to support jurisdiction on count VI, alleging breach of contract.

(3) James

Although James attended only one meeting in Idaho, at that meeting he is alleged to have directed Pintlar President, H.P. Harbert, to implement strategies to delay any action by the environmental creditors. The trustees allege that James intentionally aimed his conduct at Idaho in the hopes of sidetracking any inquiry by Idaho creditors that might have upset the looting of Gulf. If proved, such conduct satisfies the purposeful availment prong.[14]

As with Rowland and Hudd, exercise of personal jurisdiction over James for the breach of contract claim, count VI, is not appropriate.

(4) Moran and Inoco

Neither Moran nor Inoco are alleged to have personally directed any action at Idaho that caused harm within the state. However, each is alleged to have acted in concert with the other defendants in a joint effort to mislead Idaho creditors and loot Gulf's assets. Accordingly, the Trustees urge the court to impute to Moran and Inoco, as co-conspirators, the jurisdictional contacts of the other defendants-conspirators.

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[14] The bankruptcy court erroneously stated that James "did not make any misrepresentation in Idaho," and that he did not "perform any acts in furtherance of the conspiracy to loot Gulf in Idaho." Mem. of Decision, Tab 67 at 56. The bankruptcy court reached this conclusion by relying on the affidavit submitted by James. At this stage of the litigation, where there has not been an evidentiary hearing to resolve issues of credibility, the "documents submitted by the plaintiff 'are construed in the light most favorable to the plaintiff and all doubts are resolved in its favor.' " *Neaves*, 912 F.2d at 1062 n.1; *see also Sher*, 911 F.2d at 1361 (plaintiff's allegations are assumed to be true). Thus, the bankruptcy court erred as a matter of law in referring to the James declaration and ignoring the Trustees' written submissions.

Until recently the Ninth Circuit had not determined whether due process concerns would permit the forum contacts of one conspirator to be imputed to a co-conspirator. However, cases indicated that where positive law created an agency-type relationship, the jurisdictional contacts of the "agent" could be attributed to the "principal." *See, e.g., Wells Fargo & Co.*, 556 F.2d at 419-20, 422-24 (concluding that under case law a corporation can be an "agent" and therefore its contacts with forum state can be imputed to the "principal"); *Sher*, 911 F.2d at 1362 (holding that under state law a partner is an agent of the partnership and therefore the partner's contacts with forum state can be imputed to the partnership). Consistent with these decisions, the Ninth Circuit has now expressed its willingness to accept a conspiracy theory of jurisdiction, so long as the jurisdictional facts are adequately alleged. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 364-65 (9th Cir. 1995).

The court finds that, as required by *Underwager*, the Trustees have alleged facts which satisfy their burden to make a prima facie showing of a conspiracy, sufficient to support the purposeful availment test. The Trustees have alleged that the Rowland Directors controlled Inoco, which in turn controlled Gulf; that the Rowland Directors voted as a block and knowingly acted in concert with each other and Inoco; that certain overt acts in furtherance of the conspiracy occurred in Idaho; that all defendants knew of the efforts to loot Gulf; and that all benefited from the wrongful conduct. Because the court concludes that the above allegations meet the requirements of the "conspiracy theory of jurisdiction," each of the contacts that support jurisdiction over Rowland, Hudd and James also support the exercise of personal jurisdiction over Moran and Inoco. *Cf. Sher*, 911 F.2d at 1362.

b. Arising Out Of

"The second prong of the specific jurisdiction test is met if 'but for' the contacts between the defendant and the forum state, the cause of action would not have arisen." *Terracom v.*

Valley Nat. Bank, 49 F.3d 555, 561 (9th Cir. 1995). The defendants appear to argue that at least as to count IX, alleging fraudulent procurement of releases, the "but for" test has not been satisfied because the releases were obtained after the Idaho contacts, and after the defendants ceased to be owners and directors of Gulf.[15] The Trustees contend, in turn, that the defendants' successful effort to mislead Idaho creditors was a necessary step to the completion of all of the alleged torts, including the fraudulent procurement of the releases. According to the Trustees, had the defendants not deceived Idaho creditors, the resident creditors would have prevented the defendants from "looting" Gulf and fraudulently obtaining the subsequent releases, which potentially shield the defendants from any action to recover the company's assets.

The court believes the Trustees' argument is supported by case law and therefore concludes that "but for" the contacts with Idaho, the claims would not have arisen. See *Shute v Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir. 1990) (explaining "but for" test and concluding that test is satisfied if the defendant's forum-related activities put the parties within "tortious striking distance"), *rev'd on other grounds*, 499 U.S. 585 (1991); *see also Ziegler*, 64 F.3d at 474; *Ballard*, 65 F.3d at 1500.

c. Reasonableness of Exercising Jurisdiction

Once the first two prongs of the test are satisfied, the burden is on the defendants to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." In evaluating reasonableness the court should consider: the extent of the defendants' purposeful interjection into the forum state; the defendants' burdens from litigating in the forum; the extent of the conflict with the sovereignty of the defendants' state; the forum state's interest in adjudicating the dispute; the most efficient forum for

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[15] The defendants present a related argument with regard to the breach of contract claim, count VI. In light of the court's disposition of count VI, it need not address this argument.

judicial resolution of the controversy; the Trustees' interests in convenient and effective relief; and the availability of an alternative forum. *Ziegler*, 64 F.3d at 475; *Sher*, 911 F.2d at 1364. The court must balance the seven factors to determine whether the exercise of jurisdiction would be reasonable.

(1) Extent of Purposeful Injection

As discussed above, the defendants purposefully directed their activities into Idaho by attempting to influence resident creditors. They directed their actions at creditors they knew resided in Idaho with the alleged intention of causing harm to those creditors. Thus, the extent of purposeful injection into Idaho was significant. *See Ziegler*, 64 F.3d at 475 (concluding that agent's actions, and thus actions imputed to principal, constituted significant purposeful injection into forum state where actions were directed at a person known to be in the forum, with the intended purpose of causing harm in the forum state).

(2) Burden on the Defendants

To succeed on this factor, the defendants must show that the inconvenience of litigating this action in Idaho is so great that it would amount to a due process violation. *Roth*, 942 F.2d at 623; *Sher*, 911 F.2d at 1365. The defendants fail to make this showing. Moreover, the court notes that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country." *Roth*, 942 F.2d at 623; *see also Sher*, 911 F.2d at 1365. Finally, the defendants can hardly complain that they would be unduly burdened by travel to this country when they "had no problems in [their] globetrotting endeavors" to control and manage the far-flung enterprises associated with Gulf. *See Roth*, 942 F.2d at 623.

(3) Extent of Conflict with Sovereignty of Foreign State

Given that the defendants are foreign citizens, the present action in Idaho will no doubt conflict to some degree with

another country's sovereignty. However, this consideration "is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States Court." *Id.* And although the defendants argue that because certain of the Trustees' claims may implicate English law, litigation in Idaho is inappropriate, "competing sovereignty interests are best addressed through choice-of-law rules rather than jurisdictional tests." *Sher*, 911 F.2d at 1365 n.5.

(4) Forum State's Interest in Adjudication

Idaho has a substantial interest in the litigation of this action. The fraudulent conveyance claims are "core proceedings," tied to the Idaho bankruptcy cases and controlled by federal bankruptcy law. As part of the action, the Trustees, on behalf of the environmental creditors, seek the recovery of assets to remedy environment damage in the State of Idaho. Similarly, retirees of the Bunker Hill Mine seek benefits related to their past employment in Idaho. Finally, Idaho has a strong interest in litigating claims alleged to have caused tortious injury to its residents.

(5) Most Efficient Judicial Resolution

As the bankruptcy court noted, much of the evidence regarding Gulf's solvency, and most of Gulf's corporate records are located in Idaho. Otherwise, witnesses and additional evidence are not concentrated in one forum.

(6) Convenience and Effectiveness of Relief for the Plaintiffs

Unquestionably, this factor weighs heavily in favor of the Trustees. Both debtors are now located in Idaho, as are many of the creditors. Furthermore, the Trustees' action is related to other Idaho bankruptcy proceedings, and involves additional defendants who have conceded to Idaho's jurisdiction.

(7) Availability of an Alternative Forum

In light of the fact that the Trustees' action implicates federal bankruptcy law and involves additional defendants who are United States citizens, there appears to be no other forum outside the United States that could accommodate this case.

d. Summary

After balancing all the factors, the court concludes that the defendants have not demonstrated that the exercise of personal jurisdiction would be unreasonable. Accordingly, personal jurisdiction exists over all the defendants as to all counts except count VI, the breach of contract claim.[16]

4. Service on Rowland Pursuant to Rule 7004(e)

Rowland argues that he was not properly served because service was made pursuant to Rule 4(i). According to Rowland, service in a foreign country must be accomplished in the manner prescribed by Bankruptcy Rule 7004(e), which refers only to Rule 4(d)(1) and (d)(3). The court cannot agree.

Bankruptcy Rule 7004(a) expressly incorporates the application of Rule 4(i) to adversary proceedings. Rule 4(i) is concerned solely with the manner of service "upon a party in a foreign country." Thus, by its very terms, Bankruptcy Rule 7004 permits service pursuant to Rule 4(i) where, as here, that rule pertains to the case.

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[16] On appeal, the defendants challenge the Trustees' standing to bring certain claims. Standing is a distinct component of a federal court's ability to hear a case. *See Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996). Its focus is on the plaintiff, and whether he has suffered an "injury in fact." *Id.* On the other hand, personal jurisdiction is concerned with the defendant, and whether he can be required to litigate in the chosen forum. In the bankruptcy court, the defendants based their motions to dismiss on lack of personal jurisdiction and improper service of process. Leave to appeal was granted on these same issues and only these issues. Because the defendants did not raise the standing challenge in the bankruptcy court, the court will not address the issue.

ORDER

Based on the foregoing, and being otherwise fully advised in the premises, the court HEREBY ORDERS that:

The bankruptcy court's decision to deny the defendants' motions to dismiss for lack of personal jurisdiction and improper service of process is AFFIRMED as to all counts except count VI. As to count VI, regarding breach of contract, the bankruptcy court's decision to deny the defendants' motions to dismiss for lack of personal jurisdiction is REVERSED.

IT IS FURTHER ORDERED that the bankruptcy court's decision to grant the defendants' motions to dismiss for lack of personal jurisdiction count II, regarding breach of fiduciary duties, corporate waste and mismanagement, is REVERSED.

The case is REMANDED for further proceedings consistent with this opinion.

Each party shall bear its own costs.

Dated this 16th day of August, 1996.

EDWARD J. LODGE

EDWARD J. LODGE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Bk. Case Nos. 93-02986
93-02987

Adv. Case No. 94-6016

Case No. CV 96-010-N-EJL

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION,
and H.P. HARBERT, as TRUSTEE,

Plaintiffs/Appellees,

—against—

DAVID J. ROWLAND, et al.,

Defendants.

INOCO PLC,

Defendant/Appellant.

Bk. Case Nos. 93-02986
93-02987

Adv. Case No. 94-6016

Case No. CV 96-011-N-EJL

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION, and H.P. BARBERT, as TRUSTEE,

Plaintiffs/Appellees,

—against—

DAVID J. ROWLAND, et al.,

Defendants.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, and DEREK J. MORAN,

Defendants/Appellants.

Decided February 16, 1996

ORDER CONSOLIDATING APPEALS

Having read the Stipulation among the plaintiffs/appellees and the defendants/appellants dated February , 1996, IT IS HEREBY ORDERED that:

1. The two above-captioned appeals shall be consolidated.

2. The appellants may file a joint record for the consolidated appeals.

3. The "lead case" in which all filings shall be made shall be Case No. CV 96-010-N-EJL.

4. The Bankruptcy Court, by order dated January 25, 1996, having substituted "Bernard Goodson, Ford Elsaessar, Lowell Finley, and Jay J. Miller, as Trustees" for the prior plaintiffs in Adversary Proceeding No. 94-6016, said substitution shall also apply to these appeals.

5. The caption for the consolidated appeals shall be:

Bk. Case Nos. 93-02986
93-02987

Adv. Case No. 94-6016

Case Nos. CV 96-010-N-EJL
CV 96-011-N-EJL

PINTLAR CORPORATION and GULF USA CORPORATION,
Debtors.

BERNARD GOODSON, FORD ELSAESSAR, LOWELL FINLEY, and JAY J. MILLER, as TRUSTEES,

Plaintiffs/Appellees,

—against—

DAVID J. ROWLAND, et al.,

Defendants.

INOCO PLC, DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, and DEREK J. MORAN,

Defendants/Appellants.

DATED this 16th day of February, 1996

EDWARD J. LODGE
U.S.D.J.

Dewey Ballantine
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000
John M. Friedman, Jr., Esq.
Dianne Coffino, Esq.

Givens, Pursley & Huntley
Suite 200, Park Place
277 North Sixth Street
Boise, Idaho 83701
(208) 342-6571
David R. Lombardi, Esq.
Ramona S. Neal, Esq.

Counsel to Plaintiffs

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Chapter 11 Case

Case Nos. 93-02986
93-02987

Adversary Proceeding
No. 94-6016

In re PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, *et al.*,

Plaintiffs,

—VS.—

DAVID J. ROWLAND, *et al.*,

Defendants.

Decided and Filed January 25, 1996

ORDER, UNDER BANKRUPTCY RULE 7025, (A) SUBSTITUTING BERNARD GOODSON, FORD ELSAESSAR, LOWELL FINLEY AND JAY J. MILLER, TRUSTEES, AS PLAINTIFFS, AND (B) AMENDING CAPTION TO REFLECT THE SUBSTITUTION OF PARTIES

Upon the motion dated December 11, 1995 (the "Motion") of Bernard Goodson, Ford Elsaessar, Lowell Finley and Jay J. Miller (collectively, the "*Trustees*"), as trustees of a litigation trust ("*Trust*") created on November 17, 1994 and approved by this Court by Order dated June 29, 1995, for an order, under Fed. R. Civ. P. 25(c), as made applicable to these proceedings by Bankruptcy Rule 7025, directing that (a) the Trustees, not in their individual capacities but solely as trustees of the Trust, be substituted for Pintlar Corporation, Gulf USA Corporation and H. P. Harbert, as plaintiffs in this adversary proceeding and (b) the caption for pleadings filed in this adversary proceeding be amended to reflect the sub-

stitution of parties; and adequate notice of the Motion having been given to all parties to this adversary proceeding; and no other or further notice of the Motion being necessary or required; and after due deliberation and for cause shown; it is hereby

ORDERED, that Bernard Goodson, Ford Elsaessar, Jay J. Miller and Lowell Finley, are substituted, not in their individual capacities but solely as trustees of the Trust, for Pintlar Corporation, Gulf USA Corporation and H. P. Harbert, as plaintiffs in this adversary proceeding; and it is further

ORDERED, that, commencing seven (7) days after the date hereof, any party filing a pleading in this adversary proceeding shall use the following caption in its papers:

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Chapter 11 Case

Case Nos. 93-02986
93-02987

Adversary Proceeding
No. 94-6016

In re PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

BERNARD GOODSON, FORD ELSAESSAR, LOWELL FINLEY AND JAY J. MILLER, as Trustees,

Plaintiffs,

—VS.—

DAVID J. ROWLAND, *et al.*,

Defendants.

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and it is further,

ORDERED, the Trustees shall, within five (5) business days after the date hereof, serve a copy of this Order on each defendant in this adversary proceeding.

Dated: Boise, Idaho
January 25, 1996

ALFRED C. HAGAN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Bk. Case Nos. 93-02986
93-02987

Adv. Case No. 94-6016

Case No. CV 95-_____

In re: PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, et al.,

Plaintiffs,

—VS.—

DAVID J. ROWLAND, et al.,

Defendants.

Decided December 11, 1995

ORDER GRANTING LEAVE TO APPEAL

On November 1, 1995, David J. Rowland, Jeremy E. James, David L. Hudd, and Derek L. Moran, defendants to an adversary proceeding in the bankruptcy court, filed a motion for leave to appeal from the October 6, 1995, amended order of the bankruptcy court denying their motions to dismiss for lack

of personal jurisdiction and improper service of process. Separately, on November 1, 1995, defendant Inoco Plc also filed a motion for leave to appeal from the bankruptcy court's October 6, 1995, amended order denying Inoco's motion to dismiss for lack of personal jurisdiction. On November 13, 1995, the defendants filed an amended motion for leave to appeal from the second amended order of the bankruptcy court issued November 1, 1995. The plaintiffs to the adversary proceeding filed a notice of cross-appeal November 13, 1995.

The parties agree that the bankruptcy court's second amended order is an interlocutory decision. Under 28 U.S.C. § 158(a), a district court may properly exercise appellate jurisdiction over an interlocutory order of the bankruptcy court. The determination whether to accept such an appeal is within the court's discretion. *See* Bankruptcy Rule 8003. In granting leave to appeal pursuant to 28 U.S.C. § 158, several courts have followed the standard set out in 28 U.S.C. § 1292(b), which governs interlocutory appears from the district courts to the courts of appeal. *See, e.g., In re Sperna*, 173 B.R. 654, 658 (Bankr. 9th Cir 1994). Under § 1292(b), granting leave is appropriate if the interlocutory order involves a controlling question of law as to which there is a substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of the litigation. *Id.*

Here, the defendants challenge the bankruptcy court's choice of legal standards in making the personal jurisdiction determination. As the bankruptcy court's memorandum of decision demonstrates, there is substantial ground for a difference of opinion on this issue. Finally, a resolution of this issue now will advance the ultimate termination of the litigation. Accordingly, the court concludes that the motions for leave to appeal should be granted.

ORDER

Based on the foregoing, and the court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that the motion and amended motion of defendants David J. Rowland, Jeremy E. James, David L. Hudd, and Derek J. Moran for leave to appeal to the district court from the amended order of the bankruptcy court dated October 6, 1995, and the second amended order of the bankruptcy court dated November 1, 1995, is GRANTED.

IT IS FURTHER ORDERED that the motion and amended motion of defendant Inoco Plc for leave to appeal to the district court from the amended order of the bankruptcy court dated October 6, 1995, and the second amended order of the bankruptcy court dated November 1, 1995, is GRANTED.

Dated this 11th day of December, 1995.

EDWARD J. LODGE
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Adversary No. 93-6016
Case No. 93-02986
Case No. 93-02987

In re: PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION
and H.P. HARBERT, as TRUSTEE,

Plaintiffs,

—vs.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LAWRENCE R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK A.G. formerly known as INTERALLIANZ BANK ZURICH, A.G.), INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS LTD., PORTFOLIO MANAGEMENT LIMITED, FELPARK

LIMITED (formerly known as SINO INFORMATION SERVICES LIMITED), FERRIS INVESTMENTS LIMITED, and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

Decided and Filed November 1, 1995

SECOND AMENDED ORDER

Upon the Plaintiffs' motion for clarification and reconsideration of the Amended Order of October 13, 1995, filed in this case, the Amended Order is amended and restated as follows:

ORDERED:

1. The motions to dismiss for lack of personal jurisdiction of the following defendants are GRANTED: Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Peter L. Whittaker, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD., Lawrence P. Hockey-Sweeney, and Graham F. Lacey.

2. The remaining motions filed by Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Peter L. Whittacker, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD.. Lawrence P. Hockey-Sweeney, and Graham F. Lacey are DENIED as moot.

3. The motions to dismiss for lack of personal jurisdiction of Defendants INOCO, PLC., David J Rowland, Jeremy E. James, David L. Hudd, and Derek J. Moran are GRANTED as to the torts of corporate waste and mismanagement and DENIED with respect to all other counts.

4. The motion to dismiss of William C. Horn to dismiss for lack of personal jurisdiction is DENIED.

5. Defendant William C. Horn's motion to quash service and his motion to dismiss for failure to make timely service are GRANTED and this proceeding is dismissed without prejudice as to Defendant Horn.

6. The remaining motions filed by William C. Horn are DENIED as moot.

7. The motions to quash service of Jeremy E. James, David L. Hudd and Derek J. Moran are DENIED.

8. David J. Rowland's motion to quash service is GRANTED in PART and CONTINUED in PART:

a. David J. Rowland's motion to quash service in Monaco is GRANTED.

b. With regard to David J. Rowland's motion to quash service in London, England: David J. Rowland shall have until November 15, 1995 to submit copies of the legal authority relied upon by affiant Paul Mallalieu Stanley; and the Plaintiffs shall have until November 15, 1995 to submit copies of the legal authority relied upon by affiant Peter John Fitzpatrick. The motion shall remain under advisement pending the submission of the above mentioned legal authority.

9. The Plaintiffs' motion for reconsideration of this Court's order of October 6, 1995 (as amended October 13, 1995) is DENIED as to its request for reconsideration of the following:

a. The granting the motions to dismiss for lack of personal jurisdiction of Defendants Graham F. Lacey, Interallianz Bank A.G., Interallianz Securities Corp. and Bikuben-Whitefriars Limited;

b. The granting of the motions to dismiss for lack of personal jurisdiction of Defendants David J. Rowland, Jeremy E. James, David L. Hudd, and Derek J. Moran; and

c. The granting of Defendant William C. Horn's motion to quash service.

10. The Plaintiffs shall have until November 15, 1995 to submit briefs and other material in support of their motion for reconsideration of this Court's order quashing service on Defendant David J. Rowland in Monaco and Defendant Rowland shall have thirty days thereafter to submit briefs and other legal materials in opposition to the Plaintiffs' motion to reconsider this Court's order quashing service on Rowland in Monaco.

Dated this 1st day of November, 1995.

ALFRED C .HAGAN
ALFRED C . HAGAN
U.S . BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Adversary No. 93-6016
Case No. 93-02986
Case No. 93-02987

In re: PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION
and H.P. HARBERT, as TRUSTEE,

Plaintiffs,

—vs.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LAWRENCE R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK A.G. formerly known as INTERALLIANZ BANK ZURICH, A.G.), INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS LTD., PORTFOLIO MANAGEMENT LIMITED, FELPARK

LIMITED (formerly known as SINO INFORMATION SERVICES LIMITED), FERRIS INVESTMENTS LIMITED, and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

Decided and Filed October 6, 1995

AMENDED ORDER

In accordance with the contents of the memorandum of decision entered on September 29, 1995, it is hereby,

ORDERED:

1. The motions to dismiss for lack of personal jurisdiction of the following defendants are GRANTED: Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD., Lawrence P. Hockey-Sweeney, and Graham F. Lacey.

2. The remaining motions filed by Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD., Lawrence P. Hockey-Sweeney, and Graham F. Lacey are DENIED as moot.

3. The motions to dismiss for lack of personal jurisdiction of the following defendants are DENIED: INOCO, PLC., David J. Rowland, Jeremy E. James, David L. Hudd, Derek J. Moran and William C. Horn.

4. Defendant William C. Horn's motion to quash service and his motion to dismiss for failure to make timely service are GRANTED.

5. The remaining motions filed by William C. Horn are DENIED as moot.

6. The motions to quash service of Jeremy E. James, David L. Hudd and Derek J. Moran are DENIED.

7. David J. Rowland's motion to quash service is GRANTED in PART and CONTINUED in PART:

a. David J. Rowland's motion to quash service in Monaco is GRANTED.

b. With regard to David J. Rowland's motion to quash service in London, England: David J. Rowland shall have thirty (30) days from the date of this order to submit copies of the legal authority relied upon by affiant Paul Mallalieu Stanley; and the Plaintiffs shall have thirty (30) days from the date of this order to submit copies of the legal authority relied upon by affiant Peter John Fitzpatrick. The motion shall remain under advisement pending the submission of the above mentioned legal authority.

Dated this 6th day of October, 1995.

ALFRED C. HAGAN

ALFRED C. HAGAN
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Adversary No. 93-6016
Case No. 93-02986
Case No. 93-02987

In re: PINTLAR CORPORATION
and GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION
and H.P. HARBERT, as TRUSTEE,

Plaintiffs,

—vs.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LAWRENCE R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK A.G. formerly known as INTERALLIANZ BANK ZURICH, A.G.), INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS LTD., PORTFOLIO MANAGEMENT LIMITED, FELPARK

LIMITED (formerly known as SINO INFORMATION SERVICES LIMITED), FERRIS INVESTMENTS LIMITED, and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

Decided and Filed October 2, 1995

ORDER

In accordance with the contents of the memorandum of decision entered on September 29, 1995, it is hereby,

ORDERED:

1. The motions to dismiss for lack of personal jurisdiction of the following defendants are GRANTED: Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD., Lawrence P. Hockey-Sweeney, and Graham F. Lacey.

2. The remaining motions filed by Monaco Group Fund, Interallianz Bank A.G., Interallianz Securities Corp., Bikuben-Whitefriars Limited, Cyril Warren McKenzie, Wynn Williams & Co., Olly R. Matson, Brierley Investments LTD., Lawrence P. Hockey- Sweeney, and Graham F. Lacey are DENIED as moot.

3. The motions to dismiss for lack of personal jurisdiction of the following defendants are DENIED: David J. Rowland, Jeremy E. James, David L. Hudd, Derek J. Moran and William C. Horn.

4. Defendant William C Horn's motion to quash service and his motion to dismiss for failure to make timely service are GRANTED.

5. The remaining motions filed by William C. Horn are DENIED as moot.

6. The motions to quash service of Jereme E. James, David L. Hudd and Derek J. Moran are DENIED.

7. David J. Rowland's motion to quash service is GRANTED in PART and CONTINUED in PART:

a. David J. Rowland's motion to quash service in Monaco is GRANTED.

b. With regard to David J. Rowland's motion to quash service in London, England: David J. Rowland shall have thirty (30) days from the date of this order to submit copies of the legal authority relied upon by affiant Paul Mallalieu Stanley; and the Plaintiffs shall have thirty (30) days from the date of this order to submit copies of the legal authority relied upon by affiant Peter John Fitzpatrick. The motion shall remain under advisement pending the submission of the above mentioned legal authority.

Dated this 2nd day of October, 1995.

ALFRED C. HAGAN

ALFRED C. HAGAN
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

Adversary No. 93-6016
Case No. 93-02986
Case No. 93-02987

In re: PINTLAR CORPORATION and
GULF USA CORPORATION,

Debtors.

PINTLAR CORPORATION, GULF USA CORPORATION
and H.P. HARBERT, as TRUSTEE,

Plaintiffs,

—VS.—

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD, DEREK J. MORAN, ROBERT G. BOULTON, SEYMOUR GRAUBARD, HANS W. WANDERS, GRAHAM F. LACEY, F. ALEY ALLAN, WARREN C. HABER, WILLIAM C. HORN, LAWRENCE R. MEHL, JOHN W. HERRING, ANTHONY WALTERS, CYRIL WARREN MCKENZIE, PETER L. WHITTAKER, LANE NEAVE RONALDSON, WYNN WILLIAMS & CO., ALISTER G. MCDONALD, OLLY R. MATSON, EDWARD LYNCH, INOCO PLC., NYCAL CORPORATION, INTERALLIANZ BANK A.G. formerly known as INTERALLIANZ BANK ZURICH, A.G.), INTERALLIANZ SECURITIES CORP., BIKUBEN-WHITEFRIARS LIMITED, MONACO GROUP FUND, S.A., BRIERLEY INVESTMENTS LTD., PORTFOLIO MANAGEMENT LIMITED, FELPARK LIMITED (formerly known as SINO INFORMATION

SERVICES LIMITED), FERRIS INVESTMENTS LIMITED, and LAWRENCE P. HOCKEY-SWEENEY,

Defendants.

Decided and Filed September 29, 1995

MEMORANDUM OF DECISION

John M. Friedman, Jr. and Dianne F. Coffino, DEWEY BALLANTINE, New York, New York and Terry L. Meyers, GIVENS PURSLEY WEBB & HUNTLEY, Boise, Idaho, for plaintiff.

H. Jim Magnuson, Coeur d'Alene, Idaho, for William C. Horn.

Susan A. Cahoon, KILPATRICK & CODY, Atlanta, Georgia, for Interallianz Bank A.G. & Interallianz Securities Corporation.

John F. Kurtz, Jr., HAWLEY TROXELL ENNIS & HAWLEY, Boise, Idaho, for Bikuben-Whitefriars Limited, Wynn Williams & Company, Olly R. Matson, Cyril Warren McKenzie, Peter L. Whittaker and Brierley Investments Ltd.

John T. Mitchell, MITCHELL & MITCHELL, Coeur d'Alene, Idaho, and Lawrence F. Carnevale, CARTER LEDYARD & MILBURN, New York, New York, for David J. Rowland, Derek J. Moran, David L. Hudd, Jeremy E. James, and INOCO PLC.

Barry M. Okun, ROSENMAN & COLIN, New York, New York, for INOCO, PLC.

Robert L. Dell Angelo, Los Angeles, California, for Brierley Investments.

Richard S. Taffet, GOLENBOCK EISEMANN ASSOR & BELL, New York, New York, for Bikuben-Whitefriars Limited.

Scott D. Hess, EBERLE BERLIN KADING TURNBOW & MCKLVEEN, Boise, Idaho, for Graham F. Lacey.

Patrick J. Kole, MOFFATT THOMAS BARRETT ROCK & FIELDS, Boise, Idaho, for Lawrence P. Hockey-Sweeney.

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CONCLUSION

Motions to dismiss this adversary proceeding against them for lack of personal jurisdiction have been filed by Defendants David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") Derek J. Moran ("Moran"), INOCO, PLC ("INOCO"), Monaco Group ("Monaco"), Interallianz Bank A.G. ("IBZ"), Interallianz Securities, Corp. ("IBZ-Securities"), Bikuben-Whitefriars Ltd. ("Whitefriars"), Cyril McKenzie ("McKenzie"), Peter Whittaker ("Whittaker"), Wynn Williams & Co. ("Wynn Williams"), Olly R. Matson ("Matson"), Brierley Investments ("Brierley"), Lawrence Hockey-Sweeney ("Hockey-Sweeney"), William C. Horn ("Horn"), and Graham F. Lacey ("Lacey").

The following defendants have also moved to quash service: Rowland, James, Hudd, Moran, INOCO, Monaco, IBZ, McKenzie, Whittaker, Wynn Williams, Matson, Brierley, Hockey-Sweeney and Horn.

Additionally, IBZ has moved in the alternative for change of venue to the Southern District of New York. Horn has moved in the alternative to dismiss for lack of subject matter jurisdiction and failure to state a cause of action on which relief may be granted. Defendant Brierley has moved in the alternative to dismiss for failure to state a cause of action on which relief may be granted.

For the reasons discussed below, the following defendants motions to dismiss for lack of personal jurisdiction are granted: Monaco, IBZ, IBZ Securities, Whitefriars, McKenzie, Whittaker, Wynn Williams, Matson, Brierley, Hockey-Sweeney, and Lacey. The motions to dismiss for lack of personal jurisdiction of Rowland, James, Moran, Hudd, INOCO, and Horn are denied.

Horn's motion to quash service will be granted and the amended complaint will be dismissed as to defendant Horn for failure to serve the summons and complaint within 120 days of the filing of the complaint. The motions to quash service of James, Hudd, Moran, and INOCO, will be denied. The motions to quash service of Monaco, IBZ, McKenzie, Whittaker, Wynn Williams, Matson, Brierley, Hockey-Sweeney are

moot and therefore will be denied. The motion to quash service of Rowland will continue under advisement until after the submission of additional legal materials.

The remaining motions of IBZ, Brierley and Horn are moot and will be denied.

NATURE OF THE ACTION

H.P. Harbert (the "Trustee") as trustee for the Creditors' Litigation Claims Trust[1] brings this action on behalf of the creditors of debtors Gulf U.S.A. Corp. ("Gulf") and Pintlar Corporation ("Pintlar") against certain of Gulf's former officers and directors and others and alleges the following facts.

Former directors Rowland, James, Hudd and Moran (the "Rowland Directors") controlled Gulf's board of directors (the "Board") between 1989 and 1991 (the "Rowland Era"). During the Rowland Era, the Rowland Directors conspired to loot the assets of Gulf and engaged in various schemes to defraud the creditors of Gulf by making fraudulent conveyances of Gulf property overseas and causing Gulf to engage in highly speculative investments. Various other defendants joined in the Rowland conspiracy to loot Gulf and participated in the fraudulent conveyances. The following moving defendants are included in this group: INOCO, Monaco, IBZ, IBZ Securities, Whitefriars, McKenzie, Whittaker, Wynn Williams, and Matson. Some of the defendants participated in or benefited from the fraudulent transactions, but did not join in the conspiracy to loot Gulf. Brierley and Hockey-Sweeney are in this group.

Former directors Lacey, Horn, and F. Aley Allan ("Allan") (collectively referred to as the "Lacey Directors") controlled

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[1] On November 17, 1994, subject to the approval of the Bankruptcy Court the debtors in possession, Gulf and Pintlar, transferred the claims asserted in this action to a Idaho trust formed for the purpose of liquidating certain claims including the claims alleged herein for the benefit of certain of Gulf and Pintlar's creditors.

the Board between 1991 and 1993 (the "Lacey Era"). During the Lacey Era, the Lacey Directors continued to loot Gulf and the Lacey Directors failed to recover the fraudulent transfers which occurred during the Rowland Era.

The Trustee has also named those directors who were not affiliated with either Rowland or Lacey but who served during the Rowland and/or Lacey Eras as defendants. None of the outside directors has moved to dismiss.

FACTUAL BACKGROUND

Gulf, a Delaware corporation, is a holding company whose principal assets consist of direct and indirect interests in various subsidiaries including Pintlar, Gulfpac Limited, UK ("Gulfpac"), Gulf Resources (UK) Plc ("GRE UK"), Gulf Resources Pacific Limited ("GRP"), formerly known as City Realties Limited ("CRL").

Although Gulf is currently headquartered in Kellogg, Idaho, Gulf was headquartered in Boston, Massachusetts between 1989 and 1991. Thereafter, Gulf moved its headquarters to Washington, D.C. Gulf did not relocate to Kellogg until after the transactions at issue had taken place.

Pintlar, a Delaware corporation, is a wholly owned subsidiary of Gulf, whose principal place of business is Kellogg, Idaho. This Court has ruled that Pintlar and Gulf are alter egos; therefore, there is no corporate veil between them. Thus, the creditors of Gulf are also the creditors of Pintlar. However, the holding does not extend to the time the alleged transactions took place.

Pintlar formerly owned the Bunker Hill silver and lead mining site (the "Bunker Hill Mine"). The mine was closed in 1981. By 1982, the Bunker Hill Mine had been sold to the Bunker Hill Limited Partnership ("Bunker Hill Ltd."). After the mine was sold, Gulf did not conduct any commercial business in Idaho directly or indirectly except to pay pension and medical benefits to the former employees of the Bunker Hill Mine. However, in 1992, Pintlar acquired some of Bunker

Hill Ltd.'s assets in connection with Bunker Hill Ltd.'s bankruptcy.

In September of 1983, the Environmental Protection Agency (the "EPA") placed Bunker Hill on the Superfund National Priorities list. The EPA named Gulf as a potential responsible party for the extensive environment damage at the Bunker Hill Mine.

Although Gulf had accumulated about $177 million in assets by 1989, the Trustee contends Gulf was insolvent at that time because of Pintlar's environmental, pension, medical benefit, bond and other obligations incurred in connection with the Bunker Hill Mine. The majority of these creditors were located in Idaho and the debts and liabilities were incurred as a result of Pintlar's operations in Idaho.

I. The Sale to Rowland

The Rowland Directors gained control of Gulf in the spring of 1989, when Downshire, N.V. ("Downshire"), a wholly owned subsidiary of INOCO (a United Kingdom company), purchased 34% of Gulf's outstanding shares from David and Frederick Barclay. At that time Monaco (a Panamanian investment company) held 48% of the shares of INOCO and Rowland had a controlling interest in Monaco. Amend.Comp. ¶ 58.

Delaware Business Corporations Law § 203 prohibits certain transactions with shareholders who have more than 15% of the corporation's voting stock for a period of three years following the acquisition of 15% of the corporation's stock, unless the board of directors approves the initial stock purchase. Rowland insisted that Downshire's purchase be approved by the Board. Amend.Comp. ¶ 51. As a condition for its approval, the Board required Rowland, INOCO, Downshire, Hudd, James and Moran to enter into a Standstill Agreement and Undertaking (the "Rowland Standstill Agreement") with the Barclays and Gulf. Amend.Comp. ¶ 59. The Rowland Standstill Agreement prohibited Gulf, but not its subsidiaries, from entering into a business relationship with

any officer, director or stockholder who held more than 5% of the stock of Gulf if such officer, director or stockholder had a direct or indirect financial interest in the transaction. Amend.Comp. ¶ 60. The Rowland Standstill Agreement also prohibited the officers of Gulf from making commitments of more than $100,000.00 on behalf of Gulf. Amend.Comp. ¶ 60. The limitations imposed by the Rowland Standstill Agreement could be modified by consent of two-thirds of the Board. *Id.* The Rowland Standstill Agreement states that it is to be governed and interpreted according to the laws of New York.

II. The Rowland Era

The Trustee's allegations regarding the Rowland Era transfers are hereafter summarized.

A. The Bermuda Proposal

At the May 1989 Board Meeting, the Rowland Directors proposed that Gulf reorganize as a subsidiary of a newly formed Bermuda Company. Amend.Comp. ¶ 67. A strategy report presented to the Board by the Rowland management team, describes the merger as an attempt "to raise new equity capital for acquisitions insulated from environmental claims." Amend.Comp. ¶ 69. Publicly, the Rowland Directors described the proposed reorganization as an attempt, "to avoid the income tax on future income of any non-U.S. entity subsequently acquired by Gulf." Amend. Comp. ¶ 67.

The U.S. Department of Justice and the EPA opposed the reorganization and threatened to bring an action to enjoin it. Amend.Comp. ¶ 68.

Later, after deciding to transfer ownership of recently acquired real estate in New Zealand to a New Zealand company, the Rowland Directors decided to abandon the Bermuda reorganization. Amend.Comp. ¶ 117; *See* subsection E, "The New Zealand Purchases," *infra*.

The Trustee alleges that the Bermuda proposal is evidence of the Rowland Directors' conspiracy.

B. Stock Speculation

Also at the May 1989 Board Meeting, Rowland reported on what he called potential stock opportunities. Amend.Comp. ¶ 154. The Board gave Rowland discretion to invest up to $20 million in marketable securities. Amend.Comp. ¶ 154. Four months later, at a Board Meeting in France, the Board raised Rowland's securities investment cap to $50 million. Amend.Comp. ¶ 155.

All of the authorized securities transactions took place through Gulf's wholly owned subsidiary, Sexton Limited ("Sexton"). All of the transactions were executed through defendant Whitefriars, an Anglo-Danish brokerage concern. Amend.Comp. ¶ 157.

The Trustee alleges that acting in a conspiracy with Whitefriars and IBZ Securities (a Panamanian company) Rowland directed that the trades be documented in the first instance as trades on IBZ Securities' account. Amend.Comp. ¶ 158. If these trades resulted in a loss, they were booked by handwritten entry to the Sexton account and Gulf paid the losses. Amend.Comp. ¶ 158. If the trades resulted in a gain, IBZ Securities kept the trades on its account. Between October and December of 1990, Gulf lost approximately $6.7 million as a result of these trades. During this period the stock market was generally rising.

In addition, Rowland caused Gulf to pay Whitefriars fees it was not entitled to. Amend.Comp. ¶ 159.

C. Storehouse

In June 1989, Rowland proposed that Gulf acquire Storehouse Plc. ("Storehouse"), a British retailer. Amend.Comp. ¶ 81. At that time, Monaco held a 3.5% interest in Storehouse. The Trustee alleges Whitefriars and Rowland then commenced a scheme to inflate the value of Storehouse shares. Amend.Comp. ¶¶ 83-90.

In August of 1989, Whitefriars issued a "fairness opinion" addressed to the Directors of Gulf in Boston Massachusetts, in which Whitefriars stated that the price to be paid by Gulf subsidiary GRE was reasonable. In September of 1989, after Rowland had allegedly driven up the price of Storehouse shares, the Board approved the purchase of the Storehouse shares from Monaco and affirmed its consent to a waiver of the Rowland Standstill Agreement and GRE purchased the shares. Amend.Comp. ¶¶ 87 and 88.

D. Excessive Compensation and Employment of INOCO's Employees

At the September, 1989, Board Meeting, held in Cap Ferret, France, Rowland became President and Chief Executive Officer of Gulf. James and Hudd became Executive Vice Presidents and Moran became Senior Vice President of Gulf. Amend.Comp. ¶¶ 66 and 70. At this time James, Hudd and Moran were and continued to be employed on a full time basis by INOCO. Amend.Comp. ¶ 77. The Trustee alleges the salaries paid to the Rowland Directors for serving as officers were extravagant. Amend.Comp. ¶ 77.

The fees paid to the outside directors were also increased during this period. Amend.Comp. ¶ 78.

Additionally, Rowland proposed Gulf employ INOCO's London secretarial staff and that Gulf lease office space in London and Monte Carlo and purchase office space in New York. Amend.Comp. ¶ 71. At that time, Gulf was headquartered in Boston, Massachusetts. Amend.Comp. ¶ 71. However, rather than purchase New York office space, Gulf leased the space from INOCO. Amend.Comp. ¶ 73. The office space in London and Monte Carlo was also leased from INOCO. Amend.Comp. ¶ 72.

Also at the September of 1989 Board Meeting, the Board authorized negotiations to purchase property located in Houston, Texas and New York from a wholly owned subsidiary of INOCO. Amend.Comp. ¶ 91.

E. The New Zealand Purchases

At the September, 1989, meeting, the Board also approved Rowland's proposal that Gulf invest in the Triangle Centre, a shopping center located in New Zealand. Amend.Comp. ¶¶ 93-94.

A couple of days later, Rowland sent a letter to the former employees of the Bunker Hill Mine and their families assuring them that the New Zealand purchase was not an attempt to hide assets from Pintlar's former employees, the State of Idaho, or the EPA. Amend.Comp. ¶ 95. The Trustee alleges that the contents of this letter were misleading and false and that as a consequence the recipients took no action to block the New Zealand transactions. Amend.Comp. ¶ 95.

At a subsequent Board Meeting held on October 20, 1989, Hudd (acting on behalf of Rowland) proposed Gulf continue with the proposed New Zealand acquisitions by purchasing office buildings in Auckland, Wellington and Christchurch. Amend.Comp. ¶ 96. He also proposed Gulf acquire a controlling interest in a publicly traded New Zealand company which would then be used a vehicle for the purchases. Amend.Comp. ¶ 96.

The Trustee alleges that Gulf retained Whittaker and McKenzie as accountants and Wynn Williams and Lane Neave as solicitors to assist it in the transactions. Amend.Comp. ¶ 103. The Trustee alleges that Defendant Matson was the solicitor at Wynn Williams and Alislter McDonald ("McDonald") was the solicitor at Lane Neave for Gulf.[2]

However, Wynn Williams, Matson, Whittaker and McKenzie have all submitted affidavits contending that they

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[2] The Trustee also alleges that two partners of Wynn Williams were directors of De Valdor until November 24, 1989. Matson explains that until late November of 1989, De Valdor was a shell corporation created by Wynn Williams to speed the incorporation process for its clients. Accordingly, Wynn Williams sold this shell corporation to Gulf at which time both partners resigned as directors. Matson Supp.Aff. ¶ 17.

were hired by and acted on behalf of Gulf's subsidiaries, not Gulf itself. Matson Aff. ¶¶ 4,5,9; Matson Supp.Aff. ¶ 4; Whittaker Supp.Aff.; McKenzie Supp.Aff. The correspondence between Gulf and these defendants submitted by the Trustee is not determinative of who these parties actually represented.

1. The Felpark Transactions

As proposed by the Board, nineteen of the New Zealand properties were to be purchased by De Valdor (a Gulf subsidiary) from Glentree Holdings Limited, a wholly owned subsidiary of Felpark, a Cook Islands company. However, despite this representation, the initial negotiations were made by the Rowland Directors with Mutual Life Association of Astralasia ("National Mutual").

The Trustee alleges that at Whittaker's direction, Lane Neave acquired Felpark, a Cook Islands corporation. Lynch was named as the beneficial owner. Amend.Comp. ¶ 105. Prior to the close of the sale of the National Mutual and Chase properties to De Valdor, Moran directed Lane Neave to replace De Valdor with Felpark as the purchaser in the agreements. Amend.Comp. ¶ 106. The Trustee alleges that McDonald made the change with full knowledge that Gulf was the real purchaser.

The Trustee alleges Felpark received a finders' fee from Gulf for allowing De Valdor to acquire the properties. Amend.Comp. ¶ 106. Matson and McDonald, then caused Felpark to transfer the unearned finders' fee to IBZ. Amend.Comp. ¶ 106. The Trustee alleges Matson knew at the time of the transfer that Felpark had not earned a finder's fee.

In contrast, Matson testified that he never transferred any money of behalf of Felpark and that with one exception Lane Neave handled the entire Felpark transaction. Moran told Matson that Gulf had agreed to pay Felpark a negotiation fee and asked Matson to draft a document setting forth the negotiation fee agreement. Matson Supp.Aff. ¶¶ 12, 16, 6. Whittaker and McKenzie have submitted similar denials of any

knowledge of any wrongdoing on the part of Gulf's directors. Whittaker Supp.Aff.; McKenzie Supp.Aff.

2. The Unisys Transaction

De Valdor also purchased a property known as Unisys House located in Wellington, New Zealand from Sunflower Services ("Sunflower"), a subsidiary of Citibank. The Trustee alleges that Wynn Williams Securities, Ltd., a corporation controlled by Wynn Williams, acquired an option to purchase Sunflower's common stock which it assigned to Glentree, a wholly-owned subsidiary of De Valdor. Amend.Comp. ¶ 109 Wynn Williams also acquired an option to purchase Sunflowers' preferred stock as a nominee. Amend.Comp. ¶ 110.

On Moran's behalf, Whittaker directed McDonald to acquire Kingsley from European Pacific. Amend.Comp. ¶ 111. Matson was designated as the owner of Kingsley and McKenzie was named as its sole director. Amend.Comp. ¶ 111. Kingsley was then designated as the purchaser of the Sunflower preferred stock. Amend.Comp. ¶ 111.

In February of 1990, Sunflower redeemed the 100 preferred shares from Kingsley. Sunflower financed the redemption by issuing 100 new common shares to Glentree. Glentree used money supplied by Gulf from its trust account at Wynn Williams to purchase the new common shares. Amend.Comp. ¶ 113. The funds were subsequently transferred to a bank account held by IBZ in Zurich.

The Trustee also alleges that Whittaker, McKenzie, Wynn Williams and Lane Neave were paid fees to which they were not entitled in connection with these transactions. Amend.Comp. ¶ 115. The Trustee alleges these professionals conspired with Rowland and his affiliates to fraudulently convey $8.9 million in Gulf assets to themselves and others by means of the New Zealand purchases. Amend.Comp. ¶ 115.

Matson responds that Wynn Williams Securities is a company owned by Wynn Williams for the purpose of holding securities for the benefit of overseas clients. He testifies that Wynn Williams involvement in the transaction was limited to

documenting the October 25, 1989, agreement with Sunflower and to advice McKenzie with regard to the loan from Citibank. Matson did send funds to Hong Kong on the express instructions of McKenzie. Matson states that the transfer of funds as directed by a client is the legal duty of a New Zealand attorney. Supp.Aff.Matson ¶¶ 14,20,22.

Wynn Williams, Matson, Whittaker, and McKenzie have also made detailed denials of any knowledge of wrongdoing on the part of Gulf's Directors with regard to this transaction.

3. The CRL Transaction

At the December 7, 1989 Board Meeting, Hudd proposed Gulf invest in CRL, a company listed on the New Zealand stock exchange, for the purpose of holding Gulf's recently acquired New Zealand real estate. Amend.Comp. ¶ 116. On December 12, 1989, Rowland circulated a memorandum to the Board proposing Gulf exchange its interest in De Valdor for 54% of CRL's stock.

Accordingly, twenty-five of the New Zealand properties were transferred to CRL in exchange for 230 million newly-issued shares of CRL's stock at $.036 per share, plus CRL's assumption of $65.3 million of debt on the properties. The New Zealand Properties were worth approximately $147 million at that time. Gulfpac., Gulf's wholly owned United Kingdom subsidiary held the CRL shares when the transaction was completed. Amend.Comp. ¶ 120.

As part of the transaction, Rowland suggested in a December 12, 1989, memorandum to the Board that Gulf enlist the aid of a company named Zelas to gain CRL's consent to the transaction in return for a $10.7 million loan to be secured by the Zelas' CRL shares. Rowland told the Board that Zelas was an investment company that controlled CRL. Amend.Comp. ¶ 125.

Zelas was a New Zealand corporation formed in 1989 by Gulf's accountants Whittaker and McKenzie for the sole purpose of acquiring shares in CRL from Tower Corporation. Zelas had no business operations. In October of 1989, Zelas

contracted to purchase 100 million shares or 72% of CRL from Tower Corporation for $0.33 per share.

Zelas financed the first $1.2 millon of the acquisition with a loan from a business associate of Rowland. Amend.Comp. ¶ 128. Zelas financed the next installment of the purchase price and the repayment of the initial loan with a December, 1989, loan of $11.1 million from Gulf. Amend.Comp. ¶ 130. At a March 22, 1990 Board Meeting, Rowland proposed Gulf lend Zelas an additional $33.2 million. Zelas used these funds to repay its first loan from Gulf and to pay the final installment on its purchase of shares from Tower Corporation. Amend.Comp. ¶ 131.

Zelas was unable to repay the second Gulf loan and in 1991 Gulf foreclosed on its CRL shares, thereby becoming the 91.17% owner of CRL. Amend.Comp. ¶ 134. The Trustee alleges that Rowland engineered the De Valdor/Gulf transaction as a means of dumping Zelas' bad investment in CRL stock on Gulf. Amend.Comp. ¶¶ 129, 134.

4. Settlement with Brierley

Defendant Brierley, who held a minority interest in CRL through its affiliate Portfolio Management, objected to the CRL shareholder vote approving the transaction including the appointment of Rowland and James as directors of CRL. Amend.Comp. ¶ 122. Portfolio Management then brought a suit in New Zealand to overturn the shareholder vote. Amend.Comp. ¶ 122. The suit was unsuccessful. However, Brierley threatened to file a second suit for money damages. Amend.Comp. ¶ 122. On March 30, 1990, Rowland caused Gulf to purchase Portfolio Management's shares for twice their market value. Amend.Comp. ¶ 123.

F. Houston Office Space

At a October 13, 1989, meeting of the Gulf Executive Board, Rowland proposed that Gulf acquire property located in Houston, Texas, from Portmore Corporation ("Portmore"),

an indirect subsidiary of INOCO. Amend.Comp. ¶ 137. Portmore had entered into an agreement to purchase the property in September of 1989 for $16.5 million from the FDIC. Amend.Comp. ¶ 136. At that time the property was only 54% leased. Amend Comp. ¶ 136.

The Board approved the purchase of the property for $16.5 million. The purchase price was based on Moran's projections of 100% occupancy of the office space. Amend.Comp. ¶ 141.

Gulf acquired 85% of Portmore by entering into a stock purchase agreement, dated October 31, 1989, with INOCO and Whitford Corporation, a subsidiary of INOCO, for the sum of $850.00. Amend.Comp. ¶ 138. The remaining 15% of Portmore's stock was transferred to The Willingham/Drake Company and two other real estate agents who brokered the FDIC's sale to Portmore in return for Willingham/Drakes' waiver of its $175,000.00 sales commission. Amend.Comp. ¶ 139.

Portmore, now controlled by Gulf, closed on the purchase for $16,325,000.00. Gulf funded Portmore's cash payment of $4,700,000.00. Portmore funded the remaining $11,625,000.00 with a loan guaranteed by Gulf. Amend.Comp. ¶ 140.

The property lost money from the outset and Gulf had to contribute an additional $4,000,000.00 in cash to Portmore to fund its operation. Amend.Comp. ¶ 142.

In addition, the minority shareholders of Portmore commenced an action against Gulf, INOCO, Portmore, and Rowland in which they alleged that Rowland had defrauded them. The litigation was settled by Gulf for the sum of $615,000.00. Amend.Comp. ¶ 145.

Gulf sold the property in early 1993 for $10 million.

G. Stock Redemption

At the November 24, 1989, Board Meeting, INOCO, which held a 34% interest in Gulf through Downshire, requested a waiver of the Rowland Standstill Agreement to allow INOCO to purchase 467,000 $10-stock-warrants held by institutional investors and to make such additional purchases of Gulf stock

in order to bring its holding up to 49%. Amend.Comp. ¶ 149. The stated purpose of the transaction was to create a level playing field with a minority shareholder who had expressed an interest in purchasing a controlling interest in Gulf. INOCO purchased the warrants and exercised them on December 29, 1989. Amend.Comp. ¶ 150.

Three months later, Rowland proposed that Gulf repurchase up to 500,000 (5%) of its shares of common stock for $5 million as an investment. Amend.Comp. ¶ 151. By February, 1991, Gulf had repurchased 400,000.00 of its shares for $2.5 million. Amend.Comp. ¶ 152. At the March, 11, 1991, meeting, the Board authorized the repurchase of an additional 500,000 shares.

The Trustee alleges Gulf was insolvent at the time the repurchases were made. Amend.Comp. ¶ 153. The Trustee also alleges the transaction violated Delaware corporate law.

H. Aviva Petroleum

Also at the October 4, 1990, Board Meeting, Rowland proposed that Gulf acquire a 17% interest in Aviva Petroleum, Inc. ("Aviva"), a Texas corporation, from Ferris (a company controlled by defendant Hockey-Sweeney)[3]. Amend.Comp. ¶¶ 160-161.

In 1987 and 1988, INOCO held approximately 20% of the outstanding shares of Aviva. Hudd served on the board of Aviva as a representative of INOCO until December of 1988. In late 1988, INOCO sold its interest in Aviva to Ferris. Amend.Comp. ¶ 160-161. Ferris' acquisition was financed by a loan from IBZ, facilitated by Rowland and secured by the Aviva shares. Amend.Comp. ¶ 162.[4] Rowland did not

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[3] According to his affidavit, Hockey-Sweeney held only a minority interest in Ferris at the time it acquired Aviva.

[4] According to Hockey-Sweeney's affidavit, the purchase of Aviva shares by Ferris was financed through County NatWest, an English bank, not IBZ.

disclose INOCO's interest in the Aviva stock to the board. Amend.Comp. ¶ 163.

The Trustee alleges Hockey-Sweeney made a presentation to the Board regarding the transaction. However, Hockey-Sweeney denies that he ever attended a Gulf Board Meeting. He did, however, attend a Gulf Annual Shareholders Meeting several months after the transaction was completed.

Under the terms of the acquisition, Gulf purchased 44.5 million shares of Aviva stock for 19.75 pence per share at a time when the stock was trading for 17 pence per share. The total came to approximately $17.4 million. Gulf paid $9.9 million in cash and 935,107 in newly issued Gulf common stock (approximately 8% of Gulf's common stock).

Aviva had suffered operating losses in each of the five years prior to the acquisition. It continued to suffer operating losses after Gulf's purchase. Amend.Comp. ¶¶ 165 and 167-168.

I. Kidderminster

On November 22, 1990, Greenhill Enterprises, Inc. ("Greenhill"), a Panamanian company affiliated with or controlled by Rowland, contracted to purchase property located in the Midlands of the United Kingdom and known as the Kidderminster property from the Administrative Receivers of Colorall Carpets Limited for approximately $11.8 million. Amend.Comp. ¶ 170.

Before the sale was consummated, the Rowland Directors arranged to have Neldran Limited ("Neldran"), an indirect subsidiary of Gulf, purchase the land and fixed assets of the Kidderminster property for $17.3 million. On January 4, 1991, Gulf transferred about $9.7 million to Whitefriars, the broker acting on behalf of Greenhill and an affiliate of IBZ. Greenhill used these funds to make the final payment to Colorall Receiver.

Six weeks later, after removing the movable assets (valued at approximately $3.3 million), Greenhill sold the Kidderminster Property to Neldran for $17.3 million. Gulf trans-

ferred the balance of $7.6 million to Greenhill through a series of transfers which included IBZ bank.

The Board was not made aware of the sale until after the transaction was completed.

J. Sunken Treasure

On May 10, 1991, the Rowland Directors caused Gulf's subsidiary Lawgra (No.76) Limited, a United Kingdom corporation, to purchase Bidenbaum's (a Panamanian company) interest in the cargo of the S.S. Berry, a ship sunk of the Gulf of Oman, for $1.1 million. James and Hudd were affiliated with or had an interest in Bidenbaum. James received a 50% interest in the venture without investing any capital. The Rowland Directors did not disclose this transaction to the Board of Directors.

III. The Sale to Lacey

Lacey's involvement with Gulf began in the spring of 1991, when Lacey began negotiations with Rowland for the sale of INOCO's and Downshire's shares in Gulf to Nycal, Corporation ("Nycal"), a Delaware corporation with its principal place of business in the District of Columbia. Amend.Comp. ¶ 179. At that time, Lacey was the Chief Operating Officer, President, a director and a significant shareholder of Nycal. Amend.Comp. ¶ 182.

Several of the fraudulent transactions alleged by the Trustee arise out of the sale to Nycal.

A. Meeting the Cash Requirements of Lacey

As part of the purchase agreement, Lacey required that Gulf have cash reserves of at least $50 million. To satisfy Lacey's cash reserve requirement, the Rowland Directors caused Gulfpac to borrow $6.9 million from IBZ. The loan was secured by a pledge of all Gulfpac's shares in Aviva and CRL.

The Trustee alleges that there was no business justification for the loan and that the sole purpose of the loan was to enable

Rowland to consummate the sale to Nycal. Amend.Comp. ¶¶ 179-181.

B. Excessive Severance.

The Trustee alleges that both the Rowland Directors and the Lacey Directors caused Gulf to pay exorbitant severance and termination payments to the Rowland Directors. The Trustee also alleges that the directors authorized bonuses to the officers of Gulf in connection with the sale of shares to Lacey and that these payments were fraudulent because Gulf did not receive fair value for them and Gulf was insolvent at the time they were made. Amend.Comp. ¶ 185.

IV. The Lacey Era

Like Rowland, Lacey made the Board's approval a condition of the Nycal stock purchase. Accordingly, on April 26, 1991, Lacey, Horn and Allen (the "Lacey Directors") met with the non-Rowland directors to discuss Nycal's proposed purchase of Rowland's interest in Gulf. The full Board approved the transaction on July 12, 1991. Amend.Comp. ¶ 183 As condition of its approval of the sale, the Board required Lacey to enter into a Governance Agreement which required the consent of a majority of the outside directors before Gulf could enter into a transaction with (a) INOCO, (b) a director or officer of Gulf or (c) any security holder owning more than 5% of Gulf's voting securities. Amend.Comp. ¶ 186.

The sale was closed in the United Kingdom on July 12, 1991. At the July 12, 1991, Board Meeting, the Rowland Directors resigned and were replaced by the Lacey Directors. Amend.Comp. ¶ 184. Lacey was elected President and Chief Executive officer, and Horn was elected Executive Vice President of Gulf. Amend.Comp. ¶ 184.

The Trustee's allegations against Lacey and the other Lacey Directors are summarized below:

A. The Settlement with the Rowland Group

In July of 1991, the Lacey Directors discovered the Gulfpac loan which had generated the cash needed to meet Lacey's liquidity requirements. Amend.Comp. ¶ 188. Thereafter, the Board authorized Lacey to carry out a full audit of Gulf's books and records which had been kept by INOCO employees. Amend.Comp. ¶ 189. The investigation revealed improprieties with regard to the Kidderminster transaction, the Sexton securities investments, the Gulfpac loan, and the payment of inappropriate expenses. Amend.Comp. ¶ 189-191. However, the Lacey Directors did not take any action against the Rowland Directors or the outside directors who served during the Rowland years with regard to the improprieties discovered. Amend.Comp. ¶ 192.

On September 27, 1991, Lacey proposed that Gulf enter into a settlement with the Rowland Directors, INOCO, Downshire and Monaco. Amend.Comp. ¶ 193. Pursuant to the terms of the settlement, Gulf would transfer its interest in Lawgra to INOCO in exchange for INOCO's payment of $700,000.00 of the $1.1 million debt owed by Lawgra to Gulf in connection with the Bidenbaum investment. Amend.Comp. ¶ 193. As a condition of the settlement, Rowland insisted on a general release from any potential future claims based on the Rowland Directors' management actions during their service for Gulf. Amend.Comp. ¶ 194. Although they realized such a settlement would be unfair to Gulf and could result in shareholder litigation, the Board approved the settlement agreement. Amend.Comp. ¶ 194. The settlement agreement also released INOCO from all claims and liabilities owned to Gulf and its subsidiaries as of September 30, 1991. Amend.Comp. ¶ 195.

B. Expenses and Salaries

The Trustee alleges the Board authorized excessive salaries, bonuses, consulting fees and other perks for the Lacey Directors. Amend.Comp. ¶¶ 196-199. Lacey also used Gulf funds

to pay Nycal's expenses and to compensate its officers. Amend.Comp. ¶ 201, 202. Gulf leased space from Nycal in the United States and in the United Kingdom. Amend.Comp. ¶ 200.

C. Continued Stock Redemption

As occurred during the later part of the Rowland Era, Gulf continued to repurchase its own stock during the Lacey era. Amend.Comp. ¶ 203. The Trustee alleges Gulf was insolvent at the time these purchases were made and that the purchases were contrary to applicable law. Amend.Comp. ¶ 203.

D. Continued Investment in Aviva

At the Board's direction, Gulf continued to invest in Aviva Petroleum. Amend.Comp. ¶ 204. Aviva Petroleum had lost money during the Rowland Era, and continued to lose money during the Lacey Era. Amend.Comp. ¶ 205-210.

E. The Mohamad Towfic Amad Loan

Mohamad Towfic Amad ("Amad") was a business associate of Lacey and director of Nycal. Amend.Comp. ¶ 211. In August of 1991, Amad filed for relief under Chapter 11. Amend.Comp. ¶ 212. Thereafter, Amad reached an agreement with one of his creditors, Resolution Trust Company ("RTC"), to whom he owed about $2 million, pursuant to which Amad would pay $950,000.00 in cash to satisfy the entire claim. Amend.Comp. ¶ 212

Lacey arranged to have Gulf loan Amad $950,000.00 even though Amad needed only to borrow only $649,000.00 to meet his obligation to RTC. However, Lacey insisted that as a condition of the loan that Amad use the additional $301,000.00 to purchase 86,000 shares of Nycal stock in Amad's wife's name. Amend.Comp. ¶ 213.

Later, Lacey orally agreed with Amad that he need not repay the $301,000.00 used to purchase Nycal stock. Amend.Comp. ¶ 213. When Amad failed to repay the

$301,000.00, Gulf entered into a settlement with Amad that essentially ratified Lacey's oral agreement to waive repayment of the $301,000.00. Amend.Comp. ¶ 214-215.

F. UDG Shares

On March 23, 1992, Lacey borrowed $265,167.00 from Chester Court N.V. ("Chester Court"). Amend.Comp. ¶ 220. In lieu of repaying the loan in cash, Lacey caused GRE UK to purchase 185,209 shares of United Dutch Group N.V. ("UDG") from Chester Court for $267,657.52 with Gulf funds. Amend.Comp. ¶ 220. The UDG shares were worthless and UDG went into receivership in 1993.

G. Release of Mehl

When Gulf officer Lawrence R. Mehl ("Mehl") left Gulf's employ in July of 1992, Gulf gave Mehl a general release from any claims related to his employment with Gulf. Amend.Comp. ¶ 222. The Trustee alleges the transfer was a fraudulent conveyance. Amend.Comp. ¶ 222.

The Trustee alleges the settlement agreement was an avoidable fraudulent conveyance.

DISCUSSION

The moving defendants contend this Court does not have personal jurisdiction over them. In order for this Court to assert personal jurisdiction over a non-resident defendant, the defendant must be amenable to service of summons under a rule or statute and the assertion of jurisdiction under the rule or statute must not go beyond the bounds of due process. *Omni Capital International v. Rudolf Wolff & Co., Ltd*, 484 U.S. 97, 104, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987).

I. Burden of Proof

The plaintiff has the burden of showing that the court has personal jurisdiction over the defendants. *Data Disc., Inc. v.*

Systems Tech. Assoc., Inc., 557 F.2d 1280, 1285 (9th Cir. 1977). However, "the quantum of proof required to meet that burden may vary, depending upon the nature of the proceeding an the type of evidence which the plaintiff is permitted to present." *Data Disc.*, 557 F.2d at 1285. Where the court only accepts affidavits or affidavits plus minimal discovery materials, the plaintiff need only make a *prima facie* showing of the jurisdictional facts to avoid dismissal for lack of personal jurisdiction. *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987) (citing *Data Disc*, 557 F.2d at 1285). In the present case, only affidavits have been presented. Therefore, all factual disputes must be resolved in favor of the plaintiff. *Lake v. Lake*, 817 F.2d at 1420 (citing *Brand v. Menlove Dodge*, 796 F.2d 1070, 1072 (9th Cir. 1986) and *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986)).

> Presenting a prima facie case of jurisdiction, however, does not necessarily guarantee jurisdiction over the defendant at the time of trial. The district court [or bankruptcy court] has the discretion to take evidence at a preliminary hearing in order to resolve any questions of credibility or fact that arise . . . If such an event arises, plaintiff, being put to full proof, "must establish the jurisdictional facts by a preponderance of the evidence, just as he would have to do at trial." *Data Disc.*, 557 F.2d 1285.

Lake v. Lake, 817 F.2d at 1420.

Accordingly, any findings of fact made in this opinion may be reversed in the event of contrary findings on motion for summary judgement or at trial.

II. Amenable to Service

I will begin by determining if the moving defendants are amenable to service

A. Nationwide Service:

Rule 7004(d)[5], provides for nationwide service of process in adversary proceedings. *In re Sonnyco Coal, Inc.*, 131 B.R. 799, 802 (S.D.Ohio 1990) (adopting in full the finding, opinion and ruling on personal jurisdiction of the bankruptcy court in *In re Sonnyco Coal, Inc.*, 89 B.R. 658, 669 (Bankr. S.D.Ohio 1988)); *Brooks Fashion Stores, Inc. v. Michigan Employment Security Commission (In re Brooks Fashion Stores, Inc.)*, 124 B.R. 436, 440 (Bankr.S.D.N.Y. 1991); *Teitelbaum v. Choquette & Co., Inc. (In re Outlet Dept. Stores, Inc.)*, 82 B.R. 694, 697 (S.D.N.Y. 1988).

1. Defendant Horn

Defendant Horn is a resident of Virginia and is therefore amenable to nationwide service under Rule 7004.

2. Defendant IBZ

IBZ is a Swiss bank. It maintains its principal place of business in Zurich, Switzerland. Amend.Comp. ¶ 43; Cahoon Aff. ¶ 2. It also maintains an office in London, England. Cahoon Aff. ¶ 2. IBZ contends it cannot be served under Rule 7004(d) because it is a foreign corporation. This position is incorrect. Rules 7004(d) and (e) differ in where service may be made, not in the nationality of the defendants to be served.[6] There-

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[5] Fed.R.Bankr.Pro. 7004(d) provides:

> The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

F.R.Bankr.P. 7004(d)

[6] IBZ contends that even if it may be served under Rule 7004(d), such service is limited to the methods described in F.R.Civ.P 4(c)(2)(C)(i) or (d) (West Supp. 1990). *See* F.R.Bankr.P. 7004(a) which incorporates F.R.Civ.P. 4(c)(2)(C)(i) and (d). However, service may also be made within the United States pursuant to Rule 7004(b). Rule 7004(b)(3) provides,

> Except as provided in subdivision (h), **in addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d)**

fore, IBZ is amenable to service in the United States if it or its agent for purposes of service of process is located in the United States.

The Trustee contends Kilpatrick & Cody, a law firm located in Atlanta, Georgia, is IBZ's agent for purposes of service of process. Cert. Service Doc.#2. In support of this contention, the Trustee alleges that IBZ Kilpatrick & Cody have brought an action in the United States on IBZ's behalf. Amend.Comp. ¶23. IBZ has the following action pending in the United States District Court for the Southern District of New York: *Interallianz Bank AG, a/k/a Interallianz Bank Zurich AG v. Nycal Corporation,* Civil Action No. 93 Civ. 4054 (RPP). Cahoon Aff. ¶6. This lawsuit arises out of a loan made by IBZ to Nycal in connection with Nycal's purchase of shares of Gulf from INOCO and Devonshire in July of 1991. Cahoon Aff. ¶¶4 and 6. IBZ's representative in the lawsuit is Kilpatrick & Cody.

On behalf of IBZ, Kilpatrick & Cody has filed a notice of appearance and request for service of papers in the Debtors' chapter 11 proceeding. *See* F.R.Bank.P. 9010(b).

The fact an attorney has or is representing a defendant in one action is insufficient to make him a defendant's representative for service of process in an unrelated action. *Ex-Cel Concrete Co. v. Brooks (In re Ex-Cel Concrete Co.)*, 178 B.R. 198, 203 (9th Cir. B.A.P. 1995) (citing *Maldonado v. Ramirez*,

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F.R.Civ.P., **service may be made within the United States by first class mail postage prepaid as follows:**

. . . .

(3) **Upon a** domestic or **foreign corporation** or upon a partnership or other unincorporated association, **by mailing a copy of the summons and complaint** to the attention of an officer, a managing or general agent, or **to any other agent authorized by appointment or by law to receive service of process** and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

F.R.Bankr.P. 7004(b)(3) (emphasis added).

757 F.2d 48, 51 (3rd. Cir. 1985). Thus, Kilpatrick & Cody's representation of IBZ in the past and its representation of IBZ in its suit against Nycal does not make Kilpatrick and Cody agents of IBZ for purposes of service of process.

However, the Trustee contends that by filing a notice of appearance under Rule 9010(b)[7], Kilpatrick & Cody became an "agent authorized . . . by statute to receive service" under Rule 7004(b)(3). Those courts which have considered this issue have held that filing a notice of appearance in a bankruptcy case does not provide explicit authority to receive process, but where the defendant's attorney takes an active role in the bankruptcy case, it may provide implicit authority to receive service of process. *In re Ex-Cel* (citing *In re Reisman*, 139 B.R. 797, 800-801, (S.D.N.Y. 1992)). There is no evidence that IBZ actively participated in the debtors' Chapter 11. Therefore, IBZ does not have an agent in the United States for purposes of receiving service of process. Accordingly, IBZ is not amenable to service of process under Rule 7004(b).

The Trustee has also served IBZ Bank in London pursuant to the Hague Convention. Cert.Service Doc.#53. IBZ's amenability to service outside the United States is discussed below.

3. The Alien Defendants

The remaining moving defendants are not residents of the United States and the Trustee has not alleged that they have an agent for service of process inside the United States. Accordingly, these defendants are not amenable to service of process under Rule 7004(d).

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[7] Rule 9010(b) provides:

> (b) An attorney appearing for a party in a case under the Code shall file a notice of appearance with the attorney's name, office address and telephone number, unless the attorney's appearance is otherwise noted in the record.

F.R.Bankr.P. 9010(b).

B. Worldwide Service

All of the moving defendants, except Horn, were served outside of the United States.

1. Bankruptcy Rules 7004(d) and (e)

Rule 7004(e) provides the basis for worldwide service in adversary proceedings:

> The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R.Civ.P. in a foreign country . . . (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R.Civ.P.

F.R.Bankr.P. 7004(e)(C).

F.R.Civ.P. 4(c)(2) and (e) refer only to the law of the state in which the district court is located and "a statute of the United States or an order of court thereunder." Therefore, as no statute of the United States provides for service upon them, the foreign defendants contend the Idaho long-arm statute is the only basis for service.

However, the Trustee contends 7004(d) is a "statute of the United States or order thereunder" and is therefore a statute referred to in F.R.Civ.P. 4(e). The Eleventh Circuit reached this conclusion in *Nordberg v. Granfinaciera S.A. (In re Chase & Sanborn Corp.)*, 835 F.2d 1341, 1344 (11th Cir. 1988) *reversed on other grounds*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d. 26 (1989).

The defendants refer the Court to the extensive criticism of *Nordberg* found in *Old Electric, Inc. v. RCP Inc. (In re Old Electric, Inc.)*, 142 B.R. 189, 191 (Bankr.N.D.Ohio 1992) The *In re Old Electric* court first noted that Rule 7004(d) is not a "statute" within the meaning of F.R.Civ.P. 4:

> The word "statute" is not defined in the Federal Rules or Bankruptcy Rules. In careful legal usage one would expect "statute" to be reserved for legislative acts

> and the word "rule" to describe the procedural rules prescribed by the Supreme Court. *See* 28 U.S.C. § 2075. That expectation appears borne out by the language of Federal Rule 4. Federal Rule 4(i) refers to federal or state "law", apparently to encompass both the statutes and orders mentioned in Rule 4(d). Federal Rule 4(f) provides for service "when authorized by a statute of the United States or by these rules." This indicates that the draftsmen were careful, that they distinguished statutes from rules, and that they used "law" not "statutes" as a generic referent.

In re Old Electric, 142 B.R. at 191.

The *Old Electric* decision further reasoned that to hold Rule 7004(d) was a statute for purposes of Rule 4(e) would "seriously distort the thrust of Rule 7004(e):

> Subsections (A) and (B) of Bankruptcy Rule 7004(e) are carefully drafted to provide service on foreign persons under two limited circumstances central to case administration—first, service on the debtor and certain of its affiliates and second, services on parties to adversary proceedings involving property in the custody of the bankruptcy court. If, however, we interpret the words "statute" or "order" in Rule 4(e) to include Bankruptcy Rule 7004(d), sections (A) and (B) become superfluous; subsection (C) would permit service of summons under the Bankruptcy Code on foreign persons under all circumstances (subject only to Fifth Amendment due process considerations).

In re Old Electric, 142 B R. at 192.

Lastly, the *Old Electric* court reasoned that if the drafters intended worldwide service under Rule 7004(d), it would have been much easier to say so in Rule 7004(d) rather than to have incorporated Rule 7004(d) in Rule 7004(e) via F.R.Civ.P. 4(e). *In re Old Elec. Inc.*, 142 B.R. at 190-191.

Additionally, I note that 7004(d) allows only nationwide service. Thus, even if it were a statute within the meaning of

Rule 4(e) it would not allow service of process abroad. In *Granfinciera*, the foreign defendants were served inside the United States.

I accept the reasoning of *In re Old Electric*, and conclude that Rule 7004(e) is not a "statute or order of court thereunder." *See also In re R.M.R. Corp.*, 133 B.R. 759, 761 (Bankr.D.Md. 1991); *In re New York Trap Rock Corporation*, 155 B.R. 871, 887 (Bankr.S.D.N.Y. 1993), *aff'd*, 160 B.R. 876 (S.D.N.Y. 1993) *aff'd in part on other grounds*, 42 F.3d 747 (2nd Cir. 1994). Accordingly, the foreign defendants may only be served abroad pursuant to the Idaho long-arm statute.

2. The Idaho Long Arm Statute

Idaho Code § 5-515 provides:

> Service of process upon any such person, firm, company, association or corporation who is subject to the jurisdiction of the courts of this state, as provided herein, may be made by personally serving the summons upon the defendant outside the state with the same force and effect as though summons had been personally served within this state.

Idaho Code § 5-514 provides in relevant part:

> Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> > (a) The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or

> any part thereof of such person, firm, company, association or corporation;
>
> (b) The commission of a tortious act within this state;
>
> (c) The ownership, use or possession of any real property situate within this state; . . . .

Most of the transactions alleged by the Trustee took place abroad. All of the moving defendants except Horn are also residents of foreign countries. However, the Trustee asserts that with regard to those defendants who are not residents of the United States he need only establish minimum contacts with the United States for purposes of the Idaho long-arm statute. This argument confuses the amenability and due process requirements of personal jurisdiction. The Ninth Circuit Court of Appeals has firmly rejected this approach to state long-arm statutes:

> [P]laintiffs argue that where . . . the court is to determine whether it has personal jurisdiction over an alien defendant who is being sued on a claim arising under federal law, it may appropriately consider not only the alien defendant's contacts with the forum state, but also the aggregate contacts of the alien with the United States as a whole. *See* 2 J. Moore, Moore's Federal Practice P. 4.25(5), at 72 n. 1 (Supp. 1976) . . . .
>
> It might very well be neither unfair nor unreasonable as a matter of due process to aggregate the nonforum contacts of an alien with his forum contacts or to require an alien to litigate in one state both those causes of action which originate in that forum state and those arising elsewhere in the United States. Considering the relative distances between Liechtenstein and Nevada, on the one hand, and Nevada and California, on the other, due process may indeed not be a barrier to the adoption of plaintiffs' aggregation theory in the instant suit. What

> plaintiffs overlook, however, is that, not only must the requirements of due process be met before a court can properly assert *in personam* jurisdiction, but the exercise of jurisdiction must also be affirmatively authorized by the legislature. It is because of this factor that one case relied upon by the plaintiffs to support their aggregation theory, *Engineered Sports Prods. v. Brunswick Corp.*, 362 F.Supp. 722, 728 (D.Utah 1973) is distinguishable, while a second case cited by them, *Cryomedics, Inc. v. Spembly, Ltd.*, 397 F.Supp. 287, 290-292 (D.Conn.1975), is of dubious validity.

Wells Fargo & Company v. Wells Fargo Express Company, 556 F.2d 406, 416 (9th Cir. 1977); *See also Stare of Idaho v. The M.A. Hanna Company*, 819 F.Supp. 1464, 1480 (D.Idaho 1993).

Although minimum contacts with the United States might be sufficient for due process proposes, it is not necessarily sufficient to meet the legislative requirements of the individual state long arm statute. The Ninth Circuit Court of Appeals has rejected the notion that legislative intent to include all of the jurisdictional power allowed by the Due Process Clause will expand the meaning of a state long arm statute beyond it plain meaning of a state long-arm statute. *See Wells Fargo*, 556 F.2d at 416.

The Idaho Supreme Court has held that the Idaho long-arm statute was "intended to exercise all the jurisdiction available to the State of Idaho under the due process clause of the United States Constitution." *Akichika v. Kelleher*, 96 Idaho 930, 933, 539 P.2d 283, 286 (1975) (*quoting Intermountain Bus. Forms, Inc., v. Shepard Bus. Forms Co.*, 96 Idaho 538, 531 P.2d. 1183 (1975)). However, despite this broad statement, the Idaho Supreme Court has applied the language of the statute, rather than merely applying Constitutional law. *See Akichika*, 96 Idaho at 933, 539 P.2d at 286 (construing Idaho Code § 5-514(a) and (b)). Further, the legislative intent expressed by the Idaho legislature was to exercise all of the jurisdiction available to the State of Idaho, not all of the juris-

diction available to the United States. Accordingly, despite any expanded personal jurisdiction the United States may have in the case, federal question subject matter jurisdiction is not relevant to the interpretation of the Idaho long-arm statute.

Nevertheless, the Trustee contends this court should reject *Wells Fargo* in favor of the bankruptcy court's decision in *In re Pecan Co., Inc.*, 143 B.R. 696, 701 (Bankr.N.D.Ill. 1992). The Trustee contends that in *In re Pecan* the bankruptcy court applied an aggregate national contacts test to determine if the defendant was amenable to service. This is not an exact characterization of the court's holding in *In re Pecan*. In, *In re Pecan Co.* the bankruptcy court relied on the Seventh Circuit's opinion in *United Rope Distributors, Inc. v. Seatriumph Marine Corp.*, 930 F.2d 532 (7th Cir. 1991) for the proposition that the Seventh Circuit would apply a aggregate United States contacts test to determine if the exercise of jurisdiction violated the Due Process Clause. However, before reaching the constitutional issue, the bankruptcy court first applied the Illinois long-arm statute as written. 143 B.R. at 699.[8]

Similarly, in *United Rope*, the court of appeals determined that Congress could use a national contacts test in matters of federal question jurisdiction. However, the court declined the plaintiffs' request that it establish a federal common law personal jurisdiction basis on national contacts on the grounds that personal jurisdiction must be created by statute. *United Rope*, 930 F.2d at 533-535. The *United Rope* court then noted that although the language of the Wisconsin long-arm statute encompassed the defendant, Wisconsin could not constitutionally exercise jurisdiction over the defendant because the defendant did not have minimum contacts with the state of

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[8] In 1989, the Illinois legislature added the following subsection to the Illinois long-arm statute:

> A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the constitution of the United States.

Ill Rev.Stat. ch. 110, ¶2-209(c).

Wisconsin. *United Rope*, 930 F.2d at 535. The court expressed some sympathy with the minority view that it should apply a national contacts test when assessing the constitutionality of the Wisconsin statue in federal questions cases. However, the court declined to decide the issue because it had not been raised below. *Id.* Notably, what the Seventh Circuit did not do is suggest that the courts rewrite the Wisconsin statute to replace the word "Wisconsin" with the word "United States." *See also Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d 1265, 1271 (6th Cir. 1994) (applying minimal national contacts test **after** determining that the defendant was amendable to suit under the Kentucky state long-arm statute).

Next, The Trustee contends the Ninth Circuit Court of Appeals has indicated, in *dicta*, that it will reverse its decision in *Wells Fargo* and adopt the minority view. *People's Insurance Company of China v. M/V Damodar Tanabe*, 903 F.2d 675, 679 n.5 (9th Cir. 1990). However, the court of appeals did not suggest it would overrule *Wells Fargo*. What the appellate court did was state that, "[i]t is well-settled that the minimum contacts analysis, even for a federal court sitting in admiralty, must assess a defendant's contacts with a state, rather than the United States as a whole." *Id.* The Court then went on to note that some commentators have advocated a national contacts test to foreign defendants when applying Fifth Amendment in other federal contexts. The court noted that at least one district court has applied a national contacts test when applying the Fifth Amendment in an admiralty case. *Id. citing Holt v. Klosters Rederi A/S*, 355 F.Supp. 354, 357 (W.D.Mich.1973). The circuit court did not consider national contacts as part of the initial determination of whether contacts with the United States would satisfy the specific language of the relevant state long-arm statute. Thus, the Ninth Circuit Court of Appeals discussion in *People's Insurance Company* is not relevant to the construction of the Idaho long-arm statute.

I must therefore apply the Idaho long-arm statute to each of the defendants to determine if they are amenable to service of process.

a. The Rowland Directors

The Rowland Directors have had little actual contact with Idaho. The Rowland Directors did however, attend many Board Meetings in the United States and many of the transactions alleged were authorized at those Board Meetings. However, none of the Board Meetings was held in Idaho. Rowland Decla. ¶ 21; Hudd Decla. ¶ 16; James Decla. ¶ 14; Moran Decla. ¶ 13.

Rowland and Hudd have had the most actual Idaho contacts. Rowland travelled to Idaho on two occasions in his capacity as CEO of Gulf. Rowland Decla. ¶ 17. In the summer of 1989, he toured the Bunker Hill Mine. In October of 1990, he met with Gulf's lawyer in Idaho to discuss a breach of contract action brought by the purchaser of the Bunker Hill Company. *Id.* He also signed a letter addressed to the former employees of the Bunker Hill Mine and their families. Rowland Decla. ¶ 18. This letter was prepared and drafted by Gulf's counsel. *Id.*

Hudd has travelled to Idaho to conduct business on behalf of Gulf. Hudd Decla. ¶ 18. He testified that none of these trips involved or were related to the transactions alleged in the complaint. *Id.* H.P. Harbert, the current president of Pintlar, testified that the Idaho meetings were for the purpose of discussing Gulf's response to EPA demands and concerns raised by the agency and others about the transfer of Gulf assets offshore. Aff.Harbert ¶ 13. At a February, 1991 meeting with Harbert and Idaho Governor Cecil Andrus, Hudd assured the Governor that Gulf was committed to conducting the Bunker Hill cleanup and that Gulf had not invested in the New Zealand property as a means of diverting Gulf assets from the EPA and other creditors. Aff.Harbert ¶ 14.

Hudd also participated in over eighteen teleconference calls placed to or from Idaho to discuss Gulf's response to the environmental problems at the Bunker Hill site. Aff. Harbert. ¶ 15.

In addition, Hudd sent one letter to the President of Bunker Hill Ltd. in Idaho to schedule a meeting to discuss the environmental cleanup. Hudd Decla. ¶ 17.

Accordingly, the Trustee concedes that the Rowland Directors neither transacted business or own property in the United States. Instead, the Trustee alleges that these defendants committed tortious acts which resulted in injuries to Gulf's creditors in Idaho.[9]

The Trustee cites two product liability cases, *Doggett v. Electronics Corp. of America*, 93 Idaho 26, 454 P.2d 63 (1969) and *Duignan v. A.H. Robins Co.*, 98 Idaho 134, 559 P.2d 750 (1977), for the proposition that jurisdiction inside Idaho may be obtained based upon acts which take place outside of Idaho. In both cases the defendant manufacturer resided outside the state, but the plaintiff was located in the state when he or she was injured by a defective product. The Trustee contends that the creditors were injured by the defendants commercial transactions outside of the state of Idaho.

The defendants contend *Doggett* and *Duignan* are inapplicable because both cases involved physical torts. Defendants rely on *Akichika v. Kelleher*. In *Akichika*, an Idaho resident sued an Oregon resident for breach of contract and fraud. After reading an advertisement in a Portland newspaper and talking to the seller on the phone, the buyer drove to Oregon where he entered into a contract to purchase a truck. The contract was executed, and the buyer took possession of the truck in Oregon. On his way home, the buyer discovered the seller had misrepresented the year and condition of the truck. The buyer filed suit in Idaho for fraud. The Idaho Supreme Court held the I.C. § 5-514(b) did not provide the courts with

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[9] The Trustee alleges the following causes of action against these defendants: (1) the defendants have caused Gulf to make fraudulent conveyances as defined by Code § 548 or state law as incorporated by Code § 548 which are avoidable by the debtor in possession under § 550; (2) the defendants breached their fiduciary duties to Gulf; (3) the defendants concealed information from Gulf and supplied false information to Gulf's creditors and Pintlar and its creditors; (4) the defendants conspired to defraud Gulf and its creditors and to loot the Gulf's assets.

personal jurisdiction over the seller because "[a]s far as fraud is concerned, there are no basic contacts in Idaho out of which the fraud arose and the injury occurred where the sale was concluded."

Akichika is not controlling. In *Akichika,* the defendant sold the car in Oregon and the plaintiff who was in Oregon when the sale was concluded was immediately injured. He was not injured in Idaho, he merely remained injured upon his return. In the present case, the creditors injured (the bond holders and the pensioners) are located primarily in Idaho. These creditors were injured when Gulf was unable to pay them. Payment was owed at the creditors location, therefore, the creditors were injured in Idaho. However, if the location of each injured party were controlling, any corporation and its officers could be sued in any state in which it had shareholders, bondholders, employees to whom it owed medical severance or retirement benefits, and any state were a supplier or other creditor had moved. Accordingly, this Court declines to hold that the location of the injured party is automatically the location of the tort.

However, when interpreting a similar long-arm statute, the Seventh Circuit held that where the defendant commits a portion of the tort in the forum state and the defendant intents to cause or knows he may cause an injury in the forum state, the forum state has personal jurisdiction over the defendant. *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276, 281 (7th Cir. 1990). When passing Idaho's long-arm statute, the state legislature borrowed the language of the long-arm statute of the state of Illinois. Consequently the Idaho Supreme Court has looked to Illinois law when construing I.C. § 5-514. *Akichika*, 96 Idaho at 933, 539 P.2d at 286. Therefore, considerable weight can be given to cases, which like *Heritage House*, construe the Illinois long-arm statute.

In *Heritage House*, Heritage House, an Illinois corporation filed an action for negligent misrepresentation, breach of contract, agency liability, and violation of the Illinois Consumer

Fraud and Deceptive Business Practices Act against Continental Funding Group. Continental sent Heritage House a letter in May of 1984 offering to assist Heritage in finding high rates for its funds. Continental falsely assured Heritage that all of the money deposited in a saving and loan institution it recommended would be insured. When the savings and loan failed, Heritage lost all of the unfederally insured portion of the deposits.

The Seventh Circuit held:

> The tort alleged by Heritage House to have occurred in Illinois was Continental's misrepresentation that the entire amount of the $150,000.00 deposit would be secured for repayment, which relates to the misrepresentation cause of action and the alleged violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. The misrepresentations occurred during telephone conversations initiated by Continental and placed to Heritage House in Illinois. Furthermore, Heritage House relied upon the misrepresentations in Illinois. The acts by Continental clearly evidenced an intent to affect an Illinois interest, because Continental knew that Heritage House was an Illinois corporation investing money for two Illinois limited partnerships.
>
> The district court apparently believed that because Heritage House did not suffer an economic loss until the Savings & Loan was declared insolvent, and because that event occurred in Arkansas, that Arkansas was the situs of the tort. We respectfully disagree. We have noted that "[a]n Illinois court does not acquire jurisdiction under the 'last act' doctrine simply because an economic loss is felt in Illinois when all conduct contributing to the injury occurred outside Illinois." *Turnock*, 816 F.2d at 335. Here, however, the heart of the wrong was the misrepresentation and the reliance, not the later insolvency of the Savings & Loan. Moreover, the ultimate economic loss experienced by Heritage House was in Illinois, not in Arkansas.

> This does not mean that Illinois jurisdiction is available to every Illinois resident who incurs a loss because of the actions of a nonresident. In this case, it is the communications from the nonresident to Illinois that form the basis for jurisdiction, a situation that is under the control of the nonresident defendant, not the Illinois plaintiff.

Heritage House 906 F.2d at 282-283.

In the present case, the Trustee alleges that two of the Rowland Directors committed the tort of misrepresentation in Idaho. First Rowland wrote a letter to the retirees of Bunker Hill and their families for the alleged purpose of purpose of deceiving Idaho residents. Harbert Aff. ¶ 8-14. The misrepresentation later resulted in economic loss to the Idaho residents. Harbert Aff. ¶ 11. Similarly, the Trustee alleges that Hudd attended a conference with the Governor of Idaho in which he assured the Governor that the New Zealand transactions were not for the purpose of avoiding the Idaho creditors. Both Rowland and Hudd were very much aware of the crisis in Idaho. Harbert Aff. ¶ 8. Both actions bring the defendants squarely within the *Heritage House* decision.

However, the Rowland Directors contend that because the creditors include the EPA, and bondholders and retirees who are not Idaho residents the court should not conclude that the situs of the injury was Idaho. Nevertheless, those creditors who were afraid Gulf would make overseas transfers for the purpose of avoiding their claims were located primarily in Idaho. The negative press coverage which Rowland and Hudd wished to defuse was also emanating from Idaho. Consequently, Rowland sent the letter to Idaho and Hudd made his representations to the Governor of Idaho.

Further, the liability which the Rowland Directors are alleged to have been attempting to avoid was incurred in Idaho. The Bunker Hill Mine is located in Idaho and the assurance was made to the "people of Northern Idaho." The retiree's earned their pensions in Idaho. The bond holders financed Idaho mining operations.

Therefore, I conclude that the situs of the misrepresentation tort is Idaho. Because the CRL transaction is alleged to have been for the purpose of hiding assets from these same creditors, and is the subject of the misrepresentation, I conclude Idaho is the situs of the injury in the CRL transaction as well. The underlying New Zealand transactions were the first step in the CRL transaction and part of the same scheme. Accordingly, the situs of the injury of the torts arising out of these transaction was also Idaho.

In response, Hudd and Rowland contend that their actions were on behalf of Gulf and are therefore not to be considered as personal actions in Idaho. Generally, "a corporate officer who has contact with a forum only with regard to the performance of his official duties is not subject to personal jurisdiction in that forum." *Forsythe v. Overmyer*, 576 F.2d 779, 783-784 (9th Cir. 1978), *cert denied*, 439 U.S. 864, 99 S.Ct. 188, 58 L.Ed.2d 174 (1978). The Idaho District Court adopted this rule when applying the Idaho long-arm statute to a patent infringement brought against the Washington Potato Commission, a Washington state agency, and its members:

> It is proper to hold that a corporation which engages in activity having ramifications beyond the state in which it is physically present may have sufficient connection with a distant forum where the ramifications are felt. Yet, it is quite another matter to hold that an individual working for that same corporation, who has never been present in the distant forum with regard to a corporate transaction, has a similar connection with the distant forum.

Idaho Potato Commission v. Washington Potato Commission, 410 F.Supp. 171, 182 (D.Idaho 1975).

Nevertheless,

> A different conclusion may result if the members' acts were dishonest, criminal or where such acts in the name of the Commission constituted a subterfuge for conducting personal activities.

Idaho Potato, 410 F.Supp. at 183 n.3.

Such dishonest conduct is precisely what is alleged here. Further, if an officer interjects himself in a personal capacity into corporations' transactions with the forum state, he may subject himself to personal jurisdiction. *Id.* (where a corporate officer personally guarantee's the corporation's lease of Oregon real property, and the lease but not the guarantee states that it is subject to California law, the guarantee is sufficient to subject the officer to California personal jurisdiction).

Further, in *Idaho Potato Commission*, the commissioner was being sued for the acts of the Idaho Potato Commission. Similarly, in *Forsythe v. Overmyer*, the officer was being sued on the corporation's contract. Here, however, the Rowland Directors are being sued for acts taken against the interests of the corporation. Therefore, the Rowland Directors actions of behalf of Gulf may be considered when determining whether these defendants committed a tort in Idaho.

Accordingly, because they made misrepresentations in Idaho and performed out of state acts which resulted in injuries located in Idaho, I conclude Rowland and Hudd are amenable to service under the Idaho long-arm statute with regard to the New Zealand transactions and the CRL purchase as well as the misrepresentation claims.

Additionally, the Trustee has alleged Rowland and Hudd's Idaho misrepresentations were part of a larger conspiracy to loot Gulf. Rowland and Hudd each made misrepresentations in Idaho in furtherance of a conspiracy to defraud Gulf. The misrepresentations were a substantial step toward consummation of the conspiracy. Accordingly, Rowland and Hudd are amenable to service with regard to the alleged fraudulent transfer, misrepresentation, and civil conspiracy counts of the complaint. However, those counts concerning corporate mismanagement and waste are negligent rather intentional torts. As such they were not part of any conspiracy. Nor were they not directed at any particular creditors. The alleged mismanagement and waste did not take place in Idaho. Therefore, I conclude Rowland and Hudd are not amenable to service

under the Idaho long-arm statute with regard to claims of corporate waste or mismanagement.

James and Moran, on the other hand, did not make any misrepresentations in Idaho. Nor did they perform any acts in furtherance of the conspiracy to loot Gulf in Idaho.[10] However, when construing the Illinois long-arm statute, the Seventh Circuit has held that where a defendant commits a substantial act in Illinois in furtherance of a larger conspiracy, the defendant is subject to service under the Illinois long-arm statute with regard to all of the torts committed in furtherance of the conspiracy. *Textor v. Board of Regents of N.Ill. Univ.*, 711 F.2d 1387, 1392-1393 (7th Cir. 1983).

The defendants contend that the conspiracy theory may not be used to expand the reach of the Idaho long-arm statute. The circuits are split as to whether acts of a co-conspirator may be used to establish minimum contacts for purposes of due process. However, for the limited purpose of construing the Idaho long-arm statute (as opposed to due process considerations) the question is not whether the Ninth Circuit Court of Appeals has adopted the conspiracy theory in construing federal law or the laws of other states, but whether the Idaho Supreme Court has or would adopt the conspiracy theory in construing the Idaho long-arm statute. *Amba Marketing Systems, Inc. v. Jobar Intern, Inc.*, 551 F.2d 784, 786 (9th Cir. 1977) (amenability to service is determined according to the of the state in which the district court is sitting).

Next, the defendants contend that in *Textor* each of the defendants personally committed a substantial act in furtherance of the conspiracy in Illinois, and therefore Hudd and

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[10] James has on one occasion traveled to Idaho to conduct business of Gulf's behalf. James Decla. ¶ 15; James Supp.Decla. Harbert and James disagree as to the date of the trip. *Id.* James testified the trip was unrelated to the transfers alleged in the complaint. James Decla. ¶ 15. He has never made any telephone calls or sent any correspondence to or from Idaho which relate to the alleged fraudulent transfers. James Decla. ¶¶ 16-17.

Moran has only travelled to Idaho on one occasion in 1967 which was wholly unrelated to the allegations in the complaint. Moran Decla. ¶ 14.

Rowland's jurisdictional actions may not be used to bring other defendants within the purview of the Idaho long-arm statute. The Seventh Circuit clearly did not intend to impose any such limitation on its holding:

> The "conspiracy theory" of personal jurisdiction is based on the "time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy."

Textor, 711 F.2d at 1392.

The Idaho Supreme Court has held that it will give great weight to interpretations of the Illinois long-arm statute because the Idaho long-arm statute is based thereon. *Akichika, supra*.

Therefore, if the Idaho actions of Rowland and Hudd were part of a conspiracy with Moran and James to defraud the creditors of Gulf, then Idaho acts of Rowland and Hudd were sufficient to make Moran and James amenable to service of process. The complaint alleges that Moran and James voted as a block with the other Rowland Directors. Moran and James were aware of the negative press and other difficulties Gulf was experiencing in Idaho. Moran and James benefits from the excessive salaries made pursuant to the transfers. Moran and James were also involved in orchestrating some of the alleged fraudulent transfers. Moran was involved in completing the New Zealand transaction. James was heavily involved in the sunken treasure transaction. Both James and Moran benefited financially from various conspiracy transactions. James and Moran also had financial and employment ties to the other Rowland Directors through their employment at INOCO. Accordingly, the Trustee has alleged the specific facts necessary to show the existence of a conspiracy.

Therefore, like Rowland and Hudd, James and Moran are amenable to service of process for all of the alleged torts arising out of the conspiracy.

b. INOCO

INOCO is a foreign corporation with no offices in the United States. INOCO did, however, sell office space to Gulf in New York. INOCO was also involved in the sale of property in Houston, Texas, to Gulf. INOCO's purchase of the stock warrants also took place in the United States. Additionally, INOCO shared officers with Gulf. Those officers attended many Board Meetings in the United States and many of the transactions alleged were authorized at those Board Meetings.

However, none of the transactions with which INOCO was involved took place in Idaho. Nor were any of the Board Meetings in which INOCO participated held in Idaho. Rowland Decla. ¶21; Hudd Decla. ¶16; James Decla ¶14; Moran Decla. ¶13.

Although INOCO did not directly participate in the misrepresentations made by Rowland and Hudd, it is also an alleged member of the conspiracy to loot the assets of Gulf. INOCO, as a major shareholder of Gulf, was in a position to control Gulf. INOCO exercised that control by making its officers, the Rowland Directors, directors and officers of Gulf. INOCO, consolidated this control by providing accounting and record keeping services to Gulf. Further, the two Gulf Directors who made misrepresentations in Idaho were also officers of INOCO.

Control of Gulf would not in and of itself be sufficient to show a conspiracy. However, INOCO was the major beneficiary to many of the fraudulent transfers alleged, including the sale of property to Gulf in New York and Texas, the lease of office space in London, Gulf's redemption of INOCO stock, the sale of Aviva stock to Gulf and the Gulfpac loan which was made to facilitate INOCO's sale of stock to Nycal. Finally, INOCO was the direct beneficiary of the settlement with Gulf. Accordingly, the Trustee has alleged facts sufficient to show a conspiracy to loot Gulf between INOCO and the Rowland Directors.

INOCO may be held accountable for the knowledge of those officers that misrepresentations were necessary and would be made in Idaho. Thus, INOCO is amenable to service under the Idaho long-arm statute.

c. Wynn Williams and Matson

Wynn Williams is a New Zealand law firm and Matson is a solicitor residing in New Zealand. Neither defendant has any ties or contacts with Idaho. These defendants were only involved in the New Zealand real estate transactions. They have had no involvement with any of the other alleged transactions.

The Trustee contends that as co-conspirators of the Rowland Directors, they are subject to jurisdiction under the Idaho long-arm statute. The Trustee has alleged that these two defendants helped complete the New Zealand real estate purchases and has alleged that they knew the transfers were fraudulent. In addition, the Trustee alleges that they indirectly benefited from the New Zealand transactions in the form of unearned or inflated reenumeration.

However, unlike the case of the Rowland Directors and INOCO, the Trustee has not alleged or otherwise shown that these defendants knew of Gulf's insolvency or that misrepresentations had been made in Idaho by Rowland and Hudd. The *Textor* doctrine should not be extended to defendants who did not know that their co-conspirators would or even would likely make misrepresentations in the forum state.

> To sustain jurisdiction over an out-of-state co-conspirator these courts required something more than the presence of a con-conspirator within the forum state, [they require] substantial acts performed there in furtherance of the conspiracy and of which the out-of-state co-conspirator was or should have been aware.

Glaros v. Perse, 628 F.2d 679, 682 (1st Cir. 1980); *see also American Land Program, Inc. v. Bonaventura Uitgeners Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983);

Wesley-Jessen Corp. v. Pilkington Visioncare, 863 F.Supp. 186, 189 (D.Del. 1993); *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1269 (S.D.N.Y. 1991); *Slavador v. Meese*, 641 F.Supp. 1409, 1413 (D.Mass. 1986); *Gelday v. Quin*, 547 F.Supp. 803, 805 (D.Mass. 1982); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 938, 411 (E.D.Pa. 1981).

Further, these two defendants have made very specific denials of their involvement in the conspiracy in which they explain how they could be, and were, ignorant of the fraudulent nature of the New Zealand transactions, and why they had no duty to become better informed.

> The mere allegations of a complaint, when contradicted by affidavits, are not enough to confer personal jurisdiction over a nonresident defendant. *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967). Facts, not mere allegations, must be the touchstone.

Chem Lab Products, Inc. v. Stepanek, 554 F.2d 371, 372 (9th Cir. 1977).

Where a defendant has specifically denied an allegation of a conspiracy and the plaintiff has submitted no evidence to the contrary, the allegation of conspiracy is not in itself sufficient to establish personal jurisdiction. *Continental Nut Co. v. Robert L. Burner, Co.*, 345 F.2d 395, 398 (7th Cir. 1965). Therefore, even if the Trustee had alleged that these defendants knew or should of known of the Idaho misrepresentations, this Court would not grant jurisdiction over these defendants without the submission of evidence sufficient to raise a general issue of material fact as to whether these defendants participated in the conspiracy. This the Trustee has not done.

Accordingly, Wynn Williams and Matson are not amenable to service of process under the Idaho long-arm statute.

d. Whittaker and McKenzie

Both Whittaker and McKenzie are accountants licensed, residing, and doing business in New Zealand. Neither defendant has any ties or contacts with Idaho. These defendants were only involved in the New Zealand real estate transactions. They have had no involvement with any of the other alleged transactions.

The Trustee contends that as co-conspirators of the Rowland Directors, they are subject to jurisdiction under the Idaho long-arm statute. The Trustee has alleged that these two defendants helped complete the New Zealand real estate purchases and has alleged that they knew the transfers were fraudulent. In addition, the Trustee alleges that they indirectly benefited from the New Zealand transactions in the form of unearned or inflated reenumeration.

However, as in the case of Wynn Williams and Matson, there is no indication these defendants had any knowledge of the misrepresentations made in Idaho by the Rowland Directors or any reason to believe that misrepresentations would be made in Idaho. Such knowledge is essential to the assertion of jurisdiction over these defendants under the conspiracy theory. *See Glaros v. Perse*, 628 F.2d 679, 682 (1st Cir. 1980); *see also American Land Program, Inc. v. Bonaventura Uitgeners Maatschappij, N.V.*, 710 F.2d 1449, 1454 (10th Cir. 1983); *Wesley-Jessen Corp. v. Pilkington Visioncare*, 863 F.Supp. 186, 189 (D.Del. 1993); *Chrysler Capital Corp. v. Century Power Corp.*, 778 F.Supp. 1260, 1269 (S.D.N.Y. 1991); *Slavador v. Meese*, 641 F.Supp. 1409, 1413 (D.Mass. 1986); *Gelday v. Quin*, 547 F.Supp. 803, 805 (D.Mass. 1982); *In re Arthur Treacher's Franchisee Litigation*, 92 F.R.D. 938, 411 (E.D.Pa. 1981).

Also, like Wynn Williams and Matson, these two defendants have made specific denials of their involvement in the conspiracy. In the affidavits supporting their denials these defendants explain how they could be, and were, ignorant of the fraudulent nature of the New Zealand transactions and why they had no duty to become better informed. Therefore,

even if the Trustee had alleged that these defendants knew or should have known of the Idaho misrepresentations this Court would not grant jurisdiction over these defendants without the submission of evidence sufficient to raise a general issue of material fact as to whether these defendants participated in the conspiracy. *See* discussion of *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977); and *Continental Nut. Co. v. Robert L. Burner, Co.*, 345 F.2d 395, 398 (7th Cir. 1965). This, the Trustee has not done.

Accordingly, McKenzie and Whittaker are not amenable to service of process under the Idaho long-arm statute.

e. Brierley

The Trustee has not alleged that Brierley does business in Idaho, or that Brierley owns property in the State of Idaho. Nor has Brierley committed a tort in the state of Idaho. Indeed, the sale of Brierley's CRL shares to Gulf occurred in New Zealand and Brierley dealt with Gulf's New Zealand subsidiary, not Gulf itself. Thus, the alleged torts took place in New Zealand. *Akichika v. Kelleher*, 96 Idaho 930, 933, 539 P.2d 283, 286 (1975).

Nor has the Trustee alleged that Brierley is a member of the conspiracy to loot Gulf. Therefore, Rowland and Hudd's actions in Idaho may not be attributed to Brierley. Accordingly, Brierley is not amendable to service under the Idaho long-arm Statute.

f. IBZ

IBZ is a bank organized under the laws of Switzerland with its principal place of business in Zurich, Switzerland. The Trustee has not alleged that IBZ does business in Idaho, or that IBZ owns property in the State of Idaho. Nor has IBZ committed a tort in the state of Idaho. Indeed, the New Zealand transaction took place in New Zealand and the Kidderminster transaction took place in England. The Gulfpac loan was made to a Panamanian Corporation. Thus the alleged

torts took place in New Zealand, England or Panama. *Akichika v. Kelleher*, 96 Idaho 930, 933, 539 P.2d 283, 286 (1975).

The Trustee has alleged that IBZ was a co-conspirator. However, the Trustee has not plead any specific facts evidencing IBZ's involvement in the alleged conspiracy. Nor has the Trustee alleged or presented evidence showing IBZ knew that misrepresentations would be made in Idaho. Where the plaintiff has failed to plead specific acts evidencing a connection with the forum, dismissal without discovery is appropriate. *Greenspun v. Del Webb. Corp.*, 634 F.2d. 1204, 1208 n. 4 (9th Cir. 3980) *(citing Lehigh Valley Industries, Inc. v. Biernbaum*, 527 F.2d 87, 93 (2d. Cir. 1975)). Accordingly, the conspiracy theory may not be used to extend the Idaho long-arm statute's reach to IBZ.

g. IBZ Securities

IBZ Securities is a Panamanian corporation with its principal place of business in Zurich, Switzerland. It does not and never has had any offices or employees in the United States. Kämmler Decla. ¶¶ 2,3.

The Trustee alleges that IBZ Securities was a member of the conspiracy to loot Gulf. However, the only transaction which IBZ was involved in was the Sexton securities transactions. These trades made by Rowland through Gulf's wholly owned subsidiary, Sexton. The trades were executed by Whitefriars. The Trustee alleges that these trades were initially made for IBZ Securities account, but as the trades turned sour they were transferred by handwritten notation to Sexton's account.

The Trustee contends that because IBZ Securities conspired the Rowland Directors to loot Gulf and two of the Rowland Directors made misrepresentations in Idaho, IBZ Securities is amenable to service under the Idaho long-arm statute.

However, while the complaint may support the allegation that with regard to the Sexton trades, IBZ Securities conspired with Rowland, the facts alleged in the complaint do not

support the allegation that IBZ Securities engaged in a general conspiracy to loot Gulf. The misrepresentations made by Rowland and Hudd in Idaho were for the purpose of allowing them to conduct Gulf business in New Zealand, not Switzerland or the United Kingdom, and Rowland and Hudd did not make any misrepresentations in Idaho about the Sexton trades.

Nor is there any evidence or even an allegation in the record that IBZ Securities knew Rowland and Hudd would be making misrepresentations in Idaho about the New Zealand transactions. Therefore, because the misrepresentations were unrelated to the transactions IBZ Securities is alleged to have participated in and IBZ Securities had no knowledge of the necessity for or likelihood such misrepresentations would be made, the misrepresentations of Rowland and Hudd may not be attributed to IBZ Securities for jurisdictional purposes. *Glaros v. Perse*, 628 F.2d at 682 (1st Cir. 1980).

Accordingly, IBZ Securities is not amendable to service under the Idaho long-arm statute.

h. Whitefriars

Whitefriars is a London based brokerage house. It does not have offices in the United States.

The Trustee alleges that Whitefriars participated in the conspiracy to loot Gulf. However, the Trustee has only alleged that Whitefriars was involved in three of the fraudulent transfers including the Storehouse stock purchase, the Kidderminster property purchase, and Rowland's stock trades on behalf of Sexton. All three incidents took place in the United Kingdom.

The Trustee alleges that Whitefriars had two contacts with the United States. First, in connection with the Sexton transactions it sent trading slips to the United States. Second, in connection with the Storehouse Stock purchase, it sent a fairness opinion to Gulf at its headquarters in Boston, Massachusetts.

Whitefriars has had no contact with Idaho. The Trustee contends that because Whitefriars conspired with the Rowland Directors to loot Gulf, and two of the Rowland Directors made misrepresentations in Idaho, Whitefriars is amenable to service under the Idaho long-arm statute.

However, while the complaint may support the allegation that in three separate instances Whitefriars conspired with Rowland, the facts alleged in the complaint do not support the allegation that Whitefriars engaged in a general conspiracy to loot Gulf. The misrepresentations made by Rowland and Hudd in Idaho were for the purpose of allowing them to conduct Gulf business in New Zealand, not the United Kingdom, and Rowland and Hudd did not make any misrepresentations in Idaho about the specific transactions in which Whitefriars was involved.

Nor is there any evidence or even an allegation in the record that Whitefriars knew Rowland and Hudd would be making misrepresentations in Idaho about the New Zealand transactions. Therefore, because the misrepresentations were unrelated to the transactions Whitefriars is alleged to have participated in, and Whitefriars had no knowledge of the necessity for or likelihood such misrepresentations would be made, the misrepresentations of Rowland and Hudd may not be attributed to Whitefriars for jurisdictional purposes. *Glaros v. Perse*, 628 F.2d at 682 (1st Cir. 1980).

Accordingly Whitefriars is not amendable to service under the Idaho long-arm statute.

i. Monaco

Monaco is a Panamanian investment company. Monaco does not have any offices or employees in the United States. Rowland Decla. ¶ 5. Monaco is controlled by defendant Rowland. Monaco is also a major shareholder of INOCO.

The amended complaint alleges that Monaco conspired with Rowland and Whitefriars to loot the assets of Gulf. However, the only transaction alleged in the complaint that Monaco was directly involved in was the purchase of Storehouse shares.

This transaction and Monaco's misconduct took place entirely through the London stock exchange.

The only Idaho contacts attributed to Monaco by the Trustee are the misrepresentations of Rowland and Hudd. These alleged misrepresentations did not involve the Storehouse transaction. Nor is there any evidence that Monaco was involved in a more general conspiracy to loot the assets of Gulf. Nor, other than for the limited purposes of the alleged Storehouse conspiracy, has there been any showing that either Rowland or Hudd is an agent of Monaco. I thus fail to see how the Idaho misrepresentation could be attributed to Monaco.

The Trustee also contends that Whitefriars' fairness statement regarding the transaction should be attributed to Monaco. This representation did not take place in Idaho. Further, there is no showing that Monaco knew or had reason to know such a transaction would take place in the United States or elsewhere.

Accordingly, personal jurisdiction over Monaco is not available under the Idaho long-arm statute.

j. Hockey-Sweeney

Hockey-Sweeney is a citizen of the United Kingdom and a resident of the Bahamas. Hockey-Sweeney Decla. ¶ 2. He has never owned property or conducted business in Idaho. Hockey-Sweeney Decla. ¶¶ 13-17. His contends his only contact with the United States is that he is an officer and an indirect owner of shares in two Delaware corporations whose principal place of business is in New Jersey. Hockey-Sweeney Decla. ¶ 14.

The only connection alleged between Hockey-Sweeney and Idaho is the misrepresentations concerning the New Zealand Transactions made by Rowland and Hudd. Neither misrepresentation concerned Aviva.

Further, there is no evidence that Hockey-Sweeney was involved in a more general conspiracy to loot the assets of Gulf. Nor, other than for the limited purposes of the alleged

Aviva conspiracy, has there been any showing that either Rowland or Hudd is an agent of Hockey-Sweeney. Accordingly, I do not see how the Idaho misrepresentations could be attributed to Hockey-Sweeney. Hockey-Sweeney is not amendable to service under the Idaho long-arm statute.

k. Lacey

Lacey is a citizen of the United Kingdom and a resident of the Isle of Mann. Service was effected on the Isle of Mann.

Lacey did not make any misrepresentations in Idaho, or make any representations to Idahoans regarding the alleged fraudulent transfers. Therefore, this Court may not assert jurisdiction over Lacey in reliance on *Heritage House*.

Nor has the Trustee alleged Lacey is a member of the Rowland conspiracy. Therefore, Rowland and Hudd's Idaho misrepresentations may not be attributed to him for jurisdictional purposes. Accordingly, I conclude the Lacey is not amenable to service under the Idaho long-arm statute.

III. Due Process

Having concluded that the Rowland Directors and INOCO are amendable to service under the Idaho long-arm statute on all counts except the corporate waste and mismanagement counts and that Horn is amenable to service under Rule 7004(d), I will now determine whether such service would violate due process of law.

Because there is some disagreement among the courts about the application of Rule 7004(d) to alien defendants and the interpretation of state long-arm statutes with regard to alien defendants, I will also determine if service on the remaining alien defendants would violate due process if they were amenable to service under Rule 7004(d).

> The Due Process clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful "contacts, ties, or relations." *International Shoe Co. v.*

> *Washington*, 326 U.S., at 319, 66 S.Ct., at 160. By requiring that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign," *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683 (1977) (STEVENS, J. concurring in judgment), the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d. 490 (1980).

Burger King Corporation v. Rudzewicz, 471 U.S. 462, 471-473, 105 S.Ct. 2174, 2181-82, 85 L.Ed.2d 528 (1985).

"There are two types of personal jurisdiction: general and specific." *Fields v. Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 301 (9th Cir. 1986).

> General personal jurisdiction, which enables a court to hear cases unrelated to the defendant's forum activities, exists if the defendant has "substantial" or "continuous and systematic" contacts with the forum state [or nation]. *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 [F. 2d 1392,] at 1396 [(9th Cir. 1986)]; *Peterson v. Kennedy*, 771 F.2d 1244, 1261 (9th Cir. 1985), *cert. denied*, [475] U.S. [1122], 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986); *See Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). This a fairly high standard in practice.

Fields v. Sedgwick, 796 F.2d at 301.

In contrast, specific or limited personal jurisdiction allows a Court to exercise jurisdiction over a defendant only if the claim alleged arises out of the defendant's contact with the forum. *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987).

When analyzing either specific or general personal jurisdiction, the Ninth Circuit Court of Appeals has repeatedly held that where a federal court's subject matter jurisdiction is based on federal question jurisdiction and a federal statute provides for nationwide service, due process requires only that the defendant have minimum contacts with the United States as a whole and not the particular state in which the federal court sits. *Go-Video Inc. v. Akai Elec. Co.*, 885 F.2d 1406, 1416 (9th Cir. 1989) (regarding nationwide service of process pursuant to Clayton Act § 12); *Securities Investor Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985) (regarding nationwide service of process pursuant to Securities Exchange Act of 1934 § 27).

Bankruptcy jurisdiction is granted by 28 U.S.C. § 1334.[11] Therefore, bankruptcy jurisdiction, whether core or non-core, is federal question jurisdiction. Fraudulent conveyance claims are core proceedings over which this Court has subject matter jurisdiction. 28 U.S.C. § 157(b)(2)(H); *Duck v. Munn (In Mankin)*, 823 F.2d 1296, 1299-1301 (9th Cir. 1987) *cert denied*, 485 U.S. 1006, 108 S.Ct. 1468 (1988). The remaining claims are related to the case. Section 7004(d) provides for nationwide service. Rule 7004(d) provides for nationwide service of process. Therefore, it would appear a national contacts test should be applied. *See Diamond Mortgage Corp. of Illinois v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990), *cert denied*, 498 U.S. 1089, 111 S.Ct. 968 (1991) (because 28 U.S.C. § 1334 grants the district courts jurisdiction over all

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[11] 28 U.S.C. § 1334 provides:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 1334.

core and non-core bankruptcy matters, due process is satisfied in bankruptcy cases where the defendant has minimum contacts with the United States).[12]

However, in both *Go-Video Inc.* and *Vigman*, the defendants were amendable to jurisdiction under the federal provision providing for nationwide service. Here, only Horn was amenable to service under Rule 7004(d). The Rowland Directors and INOCO are only amenable to service under the Idaho long-arm statute.

The Ninth Circuit Court of Appeals notes in *People's Insurance Company of China*, 903 F.2d at 678 n.5,

> Commentators have recently advocated applying a "national" contacts analysis to foreign defendants in . . . federal contexts. *See, e.g.*, Comment, "National Contacts as a Basis for In Personam Jurisdiction over Aliens in Federal Question Suits," 70 Calf.L.Rev. 686, 686-97 (1982) (advocating a national contacts test over alien defendants in federal question cases); Note, "Alien

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[12] *See also In re Donald G. Attenberry, DMV, P.A. v. Barclays Bank PLC (In re Donald G. Attenberry, DMV, P.A.)*, 159 B.R. 1, 5 (D.Kan. 1993) (because bankruptcy jurisdiction is federal question jurisdiction under 28 U.S.C. § 1334, national contacts rather that state contacts analysis applies); *General American Communication v. Landsell (In re American Communications Corp.)*, 130 B.R. 136, 159-160 (S.D.N.Y. 1991) (because "related to" subject matter jurisdiction is ancillary to the underlying federal bankruptcy jurisdiction, the federal minimum contacts rule applies in "related to" adversary proceedings); *KO Trucking Company, Inc. v. Ground Control, Inc. (In re K O Trucking Company, Inc.)*, 99 B.R. 78, 80 (N.D.Ala. 1988) (stating *in dicta* that the bankruptcy courts may exercise *in personam* jurisdiction over any person located in the United State without violation of due process); *Weiboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 497 (N.D.Ill. 1988) (because bankruptcy jurisdiction is federal question jurisdiction and Rule 7004(d) provides for nationwide service, the bankruptcy courts may exercise personal jurisdiction over any person residing in the United States without violation of due process); *Highway Equipment Co. v. Alexander Howden Limited (In re Highway Equipment Co.)*, 120 B.R. 910, 915 (Bankr.S.D.Ohio 1990) (due process is satisfied in bankruptcy proceedings by minimum contacts with the United States, not the particular state in which the bankruptcy court sits).

> Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard."

Id.

Because neither the district court or the parties had considered the issue below, the *People's Insurance Company of China* court declined to determine the issue. However, in *Wells Fargo*, the Court of Appeals suggests *in dicta* that a national contacts test for alien defendants would not violate due process.

> It might very well be neither unfair nor unreasonable as a matter of due process to aggregate the nonforum [United States] contacts of an alien with his forum [state] contacts . . . Considering the relative distances between Liechtenstein and Nevada, on the one hand, and Nevada and California, on the other, due process may indeed not be a barrier to the adoption of the plaintiffs' aggregation theory in the instant suit.

Wells Fargo, 556 F.2d at 416.

The Sixth Circuit has adopted this approach in *Handley v. Indiana & Michigan Elec. Co.*, 732 F.2d at 1271 as has the Third Circuit in *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir. 1985). The Seventh Circuit has strongly suggested that it would adopt this approach if the issue were properly raised. *See* discussion of *United Rope supra*. Based upon *In re Rope*, the Illinois bankruptcy court has adopted this approach. *See In re Pecan*, 143 B.R. at 701.

A due process analysis is basically a question of fairness and in the case of a non-resident alien being sued under federal law, fairness is satisfied by a showing that the defendant could expect to be brought into court in the United States. Accordingly, this Court adopts the conclusions of the Seventh, Sixth and Third Circuit Courts and holds that it may, without violation of due process, exercise personal jurisdiction over all persons who either reside in the United States or who have minimum contacts with the United States. Therefore, when analyzing the contacts of the moving defendants,

all of the defendants United States contacts, not just their Idaho contacts may be considered.

The Ninth Circuit applies a three part test to determine personal jurisdiction in specific cases:

> (1) the non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activates; and (3) the exercise of jurisdiction must comport with fair play and substantial justice. It must be reasonable. *Haisten*, 784 F.2d at 1397; *see Burger King Corp. v. Rudzewicz*, 471 U.S. [at] 472-76, 105 S.Ct. [at] 2181-84 . . .

Lake v. Lake, 817 F.2d at 1421; *see also, Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325 (9th Cir. 1985).

With respect to the first two elements of this test the Supreme Court has stated:

> [W]ith respect to interstate [or international] contractual obligations, we have emphasized that parties who "reach out beyond one state [or nation] and create continuing relationships and obligations with citizens of another state [or nation]" are subject to regulation and sanctions in the other State for the consequences of their activities. *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950).

Burger King Corporation v. Rudzewicz, 471 U.S. at 473, 105 S.Ct. at 2182.

A. Horn

Horn is a citizen of the United States who is living and was served in the United States. Accordingly, service of Horn pur-

suant to Rule 7004(d) did not violate the Due Process Clause. *Go-Video*.

B. The Rowland Directors

The Trustee brings this action against the Rowland Directors for transactions arising out the defendants' relationship with Gulf as both its directors and officers of Gulf. Gulf is a Delaware corporation and its headquarters were in the United States throughout the defendants term as directors and employees. The Rowland Directors attended many Board Meetings in the United States. They traveled to the United States to perform other services on behalf of Gulf. They oversaw Gulf's compliance with United States tax, securities and environmental protection laws.

In connection with their terms as Directors and the purchase of the Gulf stock, which enabled them to become directors, they entered into a standstill agreement in which they submitted to the jurisdiction of the United States.

Thus, these alien defendants reached out to Gulf in the United States and forged an continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located, incorporated and headquartered.

The allegations against these defendants are that they took advantage of their fiduciary relationship to defraud Gulf and steal its assets. The alleged injuries arise directly out of the defendants relationship with Gulf. In several cases the Board's decision to authorize the alleged transactions took place in the United States. Accordingly, the alleged injuries arise out of the defendants purposeful direction of their activities toward the United States.

Based on a similar long term relationship, the Supreme Court held that Florida had jurisdiction over a Michigan resident who had never even visited Florida. *Burger King, supra*. In *Burger King*, the defendants entered into a long term franchise agreement with a Florida corporation based in Miami to operate a restaurant in Michigan. The agreement was nego-

tiated in Miami and payments were to be made to the corporation in Miami. The corporation brought an action for breach of the franchise agreement in Florida.

> In this case, no physical ties to Florida can be attributed to Rudzewicz other than MacShara's brief training course in Miami. Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a substantial connection with that State." *McGee v. International Life Insurance Co.*, 355 U.S., at 223, 78 S.Ct., at 201 (emphasis [omitted]). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. *Travelers Health Assn. v. Virginia*, 339 U.S., at 647, 70 S.Ct., at 929 . . . . Rudzewicz' refusal to make the contractually required payments in Miami, and his continued use of Burger King's trademarks and confidential business information after his termination, caused foreseeable injuries to the corporation in Florida. For these reasons it was, at the very least presumptively reasonably for Rudzewicz to be called to account there [Florida] for such injuries.

Burger King, 471 U.S. at 479, 105 S.Ct. at 2186.

However, the defendants contend the present case is more like the situation in *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) and *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980) than the situation in *Burger King, supra*.

In *World-Wide Volkswagen*, the defendant sold a automobile in New York to the plaintiff who then became involved in an automobile accident in Oklahoma. The plaintiffs contended

that because an automobile by its very nature is mobile, the defendants should could have foreseen that injuries might result in other states. The Supreme Court rejected the contention that forseebility alone was sufficient to satisfy the Due Process Clause. *World-Wide Volkswagen*, 444 U.S. at 295-296, 100 S.Ct. at 565.

Similarly, in *Asahi Metal Industry*, the defendant manufactured tire valve assemblies in Japan and sold them to tire manufacturers including a manufacturer located in Taiwan. The defendant was aware the Taiwanese manufacturer sold some of its tires in the United States. The plaintiff sued the defendant for product liability in California. The plaintiff contended California could exercise personal jurisdiction over the defendant because it did business on an international scale and therefore could be expected to defend claims internationally. Citing *World-Wide Volkswagen*, the Supreme Court once again rejected the notion that personal jurisdiction could be based on foreseeability alone. The Supreme Court held that although it was foreseeable that the tire assembly would be sold in California, the defendant did not "purposefully avail itself of the market in the forum State." However,

> Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Asahi Metal Industry, 480 U.S. at 112, 107 S.Ct. at 1032.

Here it is the defendants voluntary and knowing on going relationship with a United State's corporation, not the foreseeability of injury alone which meets the first two elements of the Due Process test.

Accordingly, this court has jurisdiction over the defendants if the exercise of jurisdiction is "reasonable" and "comports

with fair play and substantial justice." *Lake v. Lake*, 817 F.2d at 1421. The Ninth Circuit Court of appeals has identified seven factors for determining if the exercise of jurisdiction is reasonable:

> (1) The extent of the purposeful interjection into the forum state;
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> (2) The burden of the defendant of defending in the forum;
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> (3) The extent of conflict with the sovereignty of defendant's state;
>
> (4) The forum state's interest in adjudicating the dispute;
>
> (5) The most efficient judicial resolution of the controversy;
>
> (6) The importance of the forum to plaintiff's interest in convenient and effective relief;
>
> (7) The existence of an alternative forum.

FDIC v. British-American Ins. Co., Ltd., 828 F.2d 1439, 1442 (9th Cir. 1987) (quoting, *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 840 (9th Cir. 1986)).

As discussed above, the Rowland Directors have purposefully interjected themselves into the United States. These defendants worked for a U.S. corporation for over two years. During that period they traveled to the United States to hold board meetings and conduct other corporate business. The allegations against the Rowland Directors arise out of that employment. Thus, the extent to which the defendants have interjected themselves into the United States is substantial.

The Court recognizes that the burden on the defendants to litigate in the United States rather than in the United Kingdom or Monaco is substantial. These particular defendants frequently travel internationally for business purposes. They have acted as officers, directors, and advisors to a United State's corporation and have assisted the corporation in car-

rying out its duties under United States law and are therefore more familiar with the law of the United States then their nationality would indicate.

The Rowland Directors suggest the controversy is governed by foreign law because the purported settlement agreement the Rowland Directors entered into with Gulf is governed by English law and many of the transfers underlying the debtors' fraudulent conveyance claims are governed by foreign law. However, the fraudulent conveyance law which is determinative of whether either these transactions or the settlement agreement are avoidable is federal law.

Additionally, I would note that although the settlement agreement may be dispositive of Gulf's prepetition claims against the Rowland Directors, such as breach of fiduciary duty, waste, and breach of contract, it is not dispositive of the fraudulent conveyance claims. At the time the settlement agreement was entered into, the state law fraudulent conveyance claims belonged to Gulf's creditors, not Gulf prepetition, and no one had standing to bring the federal fraudulent conveyance claims. Post-petition, both the state and federal fraudulence conveyance claims, belong to the estates of the debtors, not the debtors, and may be brought only by a chapter 11 trustee or the debtors-in-possession. As these claims do not and never had belonged to Gulf, these claims could not have been settled by Gulf. Consequently, the settlement agreement has no application to these federal fraudulent conveyance claims. Therefore, the extent of conflict with the laws of a foreign sovereign is not as great as suggested by the Rowland Directors.

Nevertheless, the Court notes the Rowland Directors are residents of England and Monaco and that they have filed a declaratory judgment action in the United Kingdom seeking a declaration concerning the effect of the settlement agreement. Discovery and collection proceedings against these defendants may therefore be ultimately controlled by foreign law. Thus, there is a significant possibility of conflict with a foreign sovereign. However, given the international scope of

the complaint, such considerations would apply in whichever country the complaint was filed.

The United States has a substantial interest in the adjudication of the controversy. The Debtors' federal and state fraudulent conveyance claims account for the bulk of the Trustee's claims. Federal law governs these claims and it is federal law that grants the claims to the debtors' estate. These claims are bankruptcy core proceedings over which the United States has exclusive federal jurisdiction. Further, the claims are an essential part of the debtors' plan of reorganization. The Debtors and the bulk of the creditors affected are United States citizens and residents. Thus, the federal government has a substantial interest in the judicial resolution of the controversy.

Although Idaho law does not govern the breach of fiduciary duty claims, these claims are governed by the law of the state where Gulf is incorporated, *i.e.* Delaware. The breach of contract claims relating to the governance agreement are also governed by Delaware law. Thus, the bulk of the remaining claims are governed by United States' law.

With regard to the most effective forum for resolution of the controversy, it appears that neither the United Kingdom, New Zealand, Monaco or the United States would be an entirely satisfactory forum for litigation of the controversy. Most of the evidence regarding Gulf's solvency as well as Gulf's corporate records are located in the United States and more specifically in Idaho. Many of the witnesses involved in the particular transactions and much of the information regarding the value of the property received by Gulf is located in the countries where the transactions occurred.

The most convenient forum for the Debtors is without question Idaho. The Debtors' counsel and the Debtors primary documents are located here as are the Debtors themselves.

The claims against these particular defendants could be brought in the United Kingdom. However, it is doubtful the claims against all other defendants could be brought in the United Kingdom as many of the transactions had no connec-

tion to the United Kingdom. Similarly, although some of the claims could be litigated in New Zealand, a substantial number of the claims have no connection to New Zealand and could not be litigated there. The United States is the only forum in which all of the transactions could be litigated.

Accordingly, after considering all seven factors, I conclude the assertion of personal jurisdiction over the Rowland Directors is reasonable.

C. INOCO

INOCO's sale of property located in Texas and New York to Gulf, was activity directed to the United States and Gulf, a resident of the United States. Therefore, the first two elements of the *Burger King* test have been meet with regard to these torts.

The alleged conspiracy also meets the first two elements of the *Burger King* test. As part of the conspiracy to loot Gulf, INOCO took control of a United States corporation. It placed its employees on the board of directors of that United States corporation for the purpose of enabling it to defraud that corporation. Two of the transactions in furtherance of that conspiracy were performed by INOCO in the United States. Further, as the remaining torts alleged arise out of the conspiracy, the first two elements are also met as to the remaining torts.

In addition, like the Rowland Directors, INOCO entered into the Rowland Standstill Agreement with Gulf. This agreement was governed by United States law.

Accordingly this Court has jurisdiction over INOCO if after applying the *Lake* factors, it determines the exercise of jurisdiction is "reasonable" and "comports with fair play and substantial justice." *Lake v. Lake*, 817 F.2d at 1421.

As discussed above, INOCO purposefully interjected itself into the United States. It purchased and controlled Gulf, a United States corporation headquartered in the United States, for over two years. During that period it sold two parcels of property located in the United States to Gulf. It placed its

officers on Gulf's board of directors and it entered into a conspiracy with those directors to loot Gulf of its assets. Thus, the extent to which this defendant has interjected itself into the United States is substantial.

The burden on INOCO to litigate in the United States rather than in the United Kingdom or Monaco is substantial. However, this Court has jurisdiction over INOCO's agents, the Rowland Directors, and they will have to travel to the United States to litigate. Thus, INOCO's costs in litigating in the United States will be less then would otherwise be expected for a foreign corporation.

INOCO suggests the controversy is governed by foreign law because the purported settlement agreement it entered into with Gulf is governed by English law and many of the transfers underlying the debtors' fraudulent conveyance claims are governed by foreign law. However, as discussed above, the foreign law issues are merely tangential to the United States law question which govern the outcome in the present case.

Because the Rowland Directors have filed for declaratory judgment in the United Kingdom seeking a declaration concerning the effect of the settlement agreement which INOCO has also entered into, there is some possibility of conflict with the United Kingdom. Further, discovery and collection proceedings against INOCO may ultimately be controlled by foreign law. Thus, there is a significant possibility of conflict with a foreign sovereign. However, as discussed above, given the international scope of the complaint such considerations would apply in whichever country the complaint was filed.

As discussed above, the United States has a substantial interest in the adjudication of the controversy.

Again:

A. With regard to the most effective forum for resolution of the controversy, it appears that neither the United Kingdom, New Zealand, Monaco or the United States would be an entirely satisfactory forum for litigation of the controversy. Most of the evidence regarding Gulf's solvency as well as

Gulf's corporate records are located in the United States and more specifically in Idaho. On the other hand, many of the witnesses involved in the particular transactions and much of the information regarding the value of the property received by Gulf is located in the countries where the transactions occurred.

B. The most convenient forum for the debtors is without question Idaho. The debtors' counsel and the debtors primary documents are located here as are the debtors themselves.

C. The claims against this particular defendants could be brought in Monaco. However, it is doubted that the claims against all of the other defendants could be brought in the Monaco as many of the transactions had no connection to Monaco. The United States is the only forum in which all of the transactions could be litigated.

Accordingly, after considering all seven factors, I conclude the assertion of personal jurisdiction over INOCO is reasonable.

D. Wynn Williams and Matson

As discussed above, Wynn Williams and Matson are not amenable to service. The Trustee alleges that Wynn Williams and Matson have sufficient contacts with the United States to satisfy due process via their alleged involvement in the Rowland conspiracy and their alleged representation of Gulf.

The Ninth Circuit has yet to determine if the acts of a co-conspirator may be used to establish minimum contacts for purposes of due process.[13] However, as discussed above, the

[13] The Trustee cites two cases for the proposition that the Ninth Circuit has adopted the conspiracy theory of jurisdiction. *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204 (9th Cir. 1980) and *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309 (9th Cir. 1985). *Greenspun* does not stand for the proposition that the acts of one conspirator may be imputed to other conspirators for purposes of jurisdiction. Rather, the Ninth Circuit held that the fact a defendant is acting as part of an out-of-state conspiracy does not barr his Nevada state actions in furtherance thereof from subjecting him to Nevada jurisdiction. In *Vigman*, the Ninth

Trustee has failed to meet its burden of proof to show these defendants were involved in a conspiracy to loot Gulf. Therefore, this Court need not determine whether the conspiracy theory may be used to satisfy the requirements of due process.

Next, the Trustee alleges that because Wynn Williams represented Gulf in the New Zealand transactions, Wynn Williams and Matson have sufficient contact with the United States to support the exercise of specific jurisdiction over them.

However, Wynn Williams and Matson have submitted specific denials of any representation of Gulf. Instead, these defendants contend that they provided only limited representation to Gulf's foreign subsidiaries. The Trustee has not submitted sufficient evidence to raise a question of material fact on this issue. *See Chem Lab Products, Inc. v. Stepanek*, 554 F.2d at 372.

Further, even if Wynn Williams and Matson had represented Gulf, in addition to or as opposed to Gulf's subsidiaries, such representation would not be sufficient to support specific jurisdiction over these attorneys. Representation of a client who resides in the forum is insufficient to establish jurisdiction over an attorney unless the attorney solicited the client in the forum, performed the representation in the forum, or prepared documents intended to have an effect in the forum. *Sher v. Johnson*, 911 F.2d 1357, 1361-62 (9th Cir. 1990); *Lake v. Lake*, 817 F.2d at 1422-23. Inciden-

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Circuit held that the co-conspirator theory may be use for determining venue in securities actions. *Vigman*, 764 F.2d at 1318. Neither case holds that the conspiracy theory may be used to establish personal jurisdiction.

Those courts in the Ninth Circuit which have addressed the issue of imputed jurisdiction have rejected the conspiracy doctrine.

> personal jurisdiction over any non-resident individual must be premised upon forum related acts personally committed by the individual. Imputed conduct is just too tenuous to warrant the exercise of personal jurisdiction.

Kipperman v. McCone, 422 F.Supp. 860, 873 at fn.14 (N.D.Cal. 1976); *Karsten Manufacturing Corp. v. U.S. Golf Ass'n et al.*, 723 F.Supp. 1429, 1434 (D.Ariz. 1990).

tal correspondence or even trips to the forum state in connection with such representation are not sufficient to change this result. *Sher*, 911 F.2d at 1362.

Here, Wynn Williams and Matson were engaged by Gulf or its subsidiaries in New Zealand. It was Gulf, not the defendants, who initiated the representation. The entire representation took place in New Zealand and the property involved is located in New Zealand. Under these circumstances, Wynn Williams and Matson could not reasonably foresee being hailed into court in the United States.

Nor do the seven factors set forth in *Lake v. Lake* support jurisdiction over these defendants.

These defendants did not purposefully interject themselves into the United States. These defendants do not have any special knowledge of United States law or customs. Nor do they regularly conduct business abroad. Thus, there would be an enormous burden on these defendants to litigate these claims in the United States.

All of the transactions alleged against these defendants took place in New Zealand. Therefore, all of the claims against these defendants could be litigated in New Zealand.

Further, one of the Gulf subsidiaries involved in the transaction has already brought a lawsuit in New Zealand against these defendants. *See Sunflower Service Ltd. et al. v. Kensington Swan and Wynn Williams & Co.*, filed on June 2, 1995 in New Zealand which concerns the Unisys House transaction.

However, for the reasons discussed above, New Zealand law would only be tangential to the resolution of the fraudulent conveyance claims against these defendants.

Once again the most convenient forum for all of the defendants and the plaintiff would be the United States.

Nevertheless because of the burden which would be placed on these defendants and because of the defendants lack of contact with the United States, it would be unfair to hail the defendants into court in the United States.

E. Whittaker and McKenzie

As with Wynn Williams and Matson, the Trustee attempts to establish United States contacts with these defendants on the basis of their alleged participation of a conspiracy with the Rowland Directors. Because the Trustee has not met his burden of showing the existence of the conspiracy, the conspiracy theory may not be used to establish jurisdiction over these defendants.

Next the Trustee alleges that these defendants represented Gulf as accountants in the New Zealand transaction. Both Whittaker and McKenzie have submitted affidavits explaining that they represented Gulf subsidiaries which are not United States corporations, not Gulf. The evidence submitted by the Trustee is insufficient to raise a genuine issue of material fact on this issue.

Further, as discussed above, even if these defendants had provided accounting services to Gulf rather than Gulf's subsidiaries, such representation would not be sufficient to meet the requirements of Due Process. *See* discussion of *Sher* and *Lake v. Lake* above.

Finally for the reasons discussed above with regard to Wynn Williams and Matson, the assertion of jurisdiction over Whittaker and McKenzie would not be fair and reasonable as required by *Lake v. Lake*.[14]

F. Brierley

Even if Brierley were amenable to service of process, the exercise of jurisdiction over it would violate the Due Process Clause.

The Trustee contends this Court has general personal jurisdiction over Brierley because of the United States contacts of Brierley's subsidiaries. The mere fact a defendant corporation

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[14] Whittaker and McKenzie are also defendants in the New Zealand lawsuit regarding the Unisys House. *See Sunflower Service Ltd. et al. v. Kensington Swan and Wynn Williams & Co.*, discussed above with regard to Wynn Williams and Matson.

has a subsidiary operating in the forum state is insufficient to create jurisdiction over the corporation. *See Fields v. Sedgwick*, 796 F.2d at 301-302 ("a parent corporation's ties to a forum do not create personal jurisdiction over the subsidiary"); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13, 104 S.Ct. 1473, 1482, 79 L.Ed.2d 790 (1984) ("jurisdiction over an employee does not automatically follow from jurisdiction over the corporation with employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary."); *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985) ("the existence of a parent-subsidiary relationship is insufficient to establish personal jurisdiction over Companies [the parent corporation]").[15]

However, the Trustee contends this Court could exercise general jurisdiction of Brierley without violation of due process because either the subsidiaries are Brierley's agents or because Brierley and its United States subsidiaries are alter egos.

The Ninth Circuit Court of Appeals recently addressed the question of whether an agent's activities can be used to establish jurisdiction in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), *cert denied*, ___ U.S. ___, 115 S.Ct. 1314, 131 L.Ed.2d 196 (1995). In *Chan*, the plaintiffs sued Discoverer Reederei GmbH ("Discoverer"), a German corporation and Society Expeditions Inc. ("Society"), a Washington corporation, for personal injury and related claims arising out of the capsizing of an inflatable raft which ferried the plaintiffs from a cruise ship operated by Discoverer. Both companies were owned by defendant Klein, who served as president for the companies.

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[15] Brierley also cites *Danjaq, S.A. v. Pathe Communications Corp.*, 979 F.2d 772 (9th Cir 1992) for the proposition that the mere fact a corporation does business through a subsidiary in a forum is irrelevant to determining jurisdiction over the parent corporation. However, this case is irrelevant because it concerns the establishment of the parent corporation's principle place of business for diversity subject matter jurisdiction not for the purpose of establishing personal jurisdiction.

Discoverer had no offices, property or employees in Washington. It contended that it did not advertise or market in Washington. According to the plaintiffs, Society was Discoverer's sole and exclusive agent for booking cruises in Washington and else where and Society had no business other than to book cruises for Discovered.

The Ninth Circuit Court of Appeals held that the activities of a general agent may be used to establish minimum contacts of the principal if its,

> [forum] representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Chan v. Society Expeditions, Inc., 39 F.3d at 1405 (quoting, *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 423 (9th Cir. 1977)).

The appellate court added, "whether the general agent was a subsidiary of the principal or independently owned is irrelevant." *Id.*

Here, the Trustee contends he has alleged general agency with the statement, "Brierley regularly conducts business in the United States through three United States subsidiaries." This statement provides insufficient information for the determination of whether Brierley's subsidiaries are acting as its general agents or alter egos of Brierley. Nor has the Trustee submitted any additional information to the Court. Instead, the Trustee relies upon Pennsylvania district court cases for the proposition that where jurisdiction is based upon a foreign corporation's relationship with its subsidiary, the case should not be dismissed until the plaintiff has been allowed ample opportunity to prove his jurisdictional allegations through discovery. *Transcontinental Fertilizer Co. v. Samsung Co.*, 108 F.R.D. 650, 652 (E.D.Pa. 1985); *Aamco Automatic Transmissions, v. Tayloe*, 368 F.Supp. 1283, 1300 (E.D. Pa. 1973).

However, the burden of proof to show jurisdiction is on the plaintiff. *Data Disc., Inc.*, 557 F.2d at 1285. The Trustee has not alleged a prima facia case of personal jurisdiction. This case has been pending for over a year. To date, the Trustee has not even named the alleged subsidiaries. The Trustee has failed to meet its initial burden of showing the exercise of jurisdiction would be within the bounds of due process.

G. IBZ

IBZ is not amenable to service of process. Nor could service be made on IBZ without violation of the Due Process Clause.

The Trustee contends that this Court could exercise general jurisdiction of IBZ without violation of due process because IBZ is operating a business in the United States and because it owns property in the United States.

In support of his claim that this Court has personal jurisdiction over IBZ, Trustee alleges that IBZ regularly conducts business in the United States and that between 1985 and 1992 IBZ maintained an office in San Francisco, California. Amend.Comp. ¶43. The Trustee bases this allegation on the a listing in the American Banker. Friedman Aff. IBZ denies that it maintained any offices in the United States after 1986. Cahoon Aff. ¶2; Lyman Aff ¶2. IBZ did maintain a representative in San Francisco between 1984 and 1986. Aff.Lyman ¶3. However, IBZ closed the office in late 1986 because the office was not productive in generating business for IBZ. Lyman. Aff. ¶3. The fact Friedman was unable to find a telephone listing for IBZ after 1986 supports IBZ's contention that the office closed in 1986.

The Trustee also alleges that IBZ is a partner in Interallianz Hallwood, a joint venture entered into by IBZ and Hallwood Group, a Cleveland based company which specializes in restructuring financially-distressed companies. Amend.Comp. ¶43. Interallianz Hallwood owns a 14% interest in Saxon Oil, a Dallas based company. Amend.Comp. ¶43.

IBZ contends the Trustee has misrepresented its relationship with Hallwood Group. IBZ describes the relationship this way. In 1983, IBZ's subsidiary, Interallianz Finance N.V., a Netherlands Antilles corporation ("IBZ Finance") and Hallwood Securities N.V., a Dutch corporation controlled by Anthony J. Buniner and Brian M. Troup (both citizens of the United Kingdom) formed a new Dutch corporation known as Interallianz Hallwood N.V. IBZ Finance and Hallwood Securities each became 50% shareholders in the new corporation. Interallianz Hallwood N.V. subsequently became a wholly owned subsidiary of Interallianz Hallwood (Netherlands and Antilles) N.V. another corporation in which IBZ Finance and Hallwood Securities each held 50% of the stock. Thereafter, both IBZ Finance and Hallwood Securities each reduced their stock in Interallianz Hallwood (Netherlands and Antilles) N.V. to 47.5%. Hallwood Group later acquired the interests of Hallwood Securities in a transaction unrelated to IBZ. On August 31, 1986 IBZ Finance sold all of its stock in Interallianz Hallwood (Netherlands and Antilles) N.V. to Hallwood Group. Aff.Lyman ¶¶4-6.

IBZ has no record of ever holding any stock in Saxon. Lyman Aff. ¶7.

IBZ is the nomine owner on behalf of three Swiss citizens of property located in Colusa County, California. Lyman Aff. ¶8. IBZ had until February 4, 1993 held security interests in personal property in Texas as a result of outstanding loans from IBZ to Eastland Gas Pipeline Limited. Lyman Aff. ¶9.

IBZ has made other loans from time to time to borrowers domiciled in the United States. These loans were made through IBZ's London and Zurich offices. Lyman Aff. ¶10.

Based on this evidence, I conclude IBZ is not doing business in the United States and was not doing business in the United States during any of the time periods relevant to the claims against IBZ.

Although IBZ has made loans to persons and companies located in the United State, such activities in the forum will not, without more, subject a foreign bank to jurisdiction in the

forum. *See Burger King*, 471 U.S. at 478, 105 S.Ct. at 2185 (a contract with a member of the forum state is not sufficient to establish general jurisdiction); *Pacific Reliant Indus., Inc. v. Amerika Samoa Bank*, 901 F.2d 735, 738 (9th Cir. 1990) (issuance of a letter of credit to a resident of the forum not sufficient to subject bank to forum jurisdiction); *Gates Learjet Corp v. Jensen*, 743 F.2d 1325, 31 (9th Cir. 1984), *cert. denied*, 471 U.S. 1066, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985) (entry into a long term distributorship agreement with a member of the forum state not sufficient to establish general jurisdiction).

Nor is holding an interest in property located in the forum state or IBZ's unrelated law suit against Nycal sufficient to establish that IBZ "has 'substantial' or 'continuous and systematic' " with the United States. *Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986). *See Shaffer v. Heitner*, 433 U.S. 186, 208-210, 97 S.Ct. 2569, 2582, 53 L.Ed.2d 683 (1977) (ownership of property in forum state is not without more sufficient to satisfy the "minimum contacts" test for general jurisdiction) Therefore, IBZ is not subject to the general personal jurisdiction of the United States.

In the alternative, the Trustee contends that because of its allegations that IBZ is a co-conspirator with the Rowland Directors, this Court could use the Rowland Directors' actions to establish specific jurisdiction. However, as discussed above, the Trustee has not sufficiently alleged that IBZ is a part of the Rowland conspiracy to base jurisdiction on the conspiracy theory.

H. IBZ Securities

IBZ Securities is a Panamanian corporation. Its principal place of business is in Zurich, Switzerland. It does not and never has had any offices or employees in the United States. Decla.Kammler ¶¶2, 3.

The Trustee alleges that IBZ's contacts with the United States may be attributed to IBZ securities. However, as

discussed above IBZ has few United States contacts and this Court does not have jurisdiction over IBZ. In any case, the actions of affiliates are not attributable to a defendant unless the affiliate is the alter ego of the defendant. *Chan v. Society Expeditions, Inc.*, 39 F.2d at 1405 (9th Cir. 1994) (discussed in greater detail in *infra* with regard to Brierley's motion to dismiss).

In addition, the Trustee contends co-conspirator Rowlands' United States actions may be attributed to IBZ. This Court has not yet accepted the conspiracy theory of personal jurisdiction. However, if Rowland's United States actions with regard to the Sexton transactions were attributed to IBZ Securities, IBZ Securities lack of interjection of itself into the United States and the essentially foreign locations of the transactions would prohibit the exercise of jurisdiction over IBZ Securities. *See Lake v. Lake*. The only real tie to the United States in the Sexton transactions was Gulf's ownership of Sexton.

IBZ Securities' contact with the United States is minimal. IBZ Securities does not have any special knowledge of United States law or customs. Nor is there any evidence that it regularly conducts business abroad. Thus there would be an enormous burden on these defendants to litigate these claims in the United States.

All of the transactions alleged against this defendant took place in the United Kingdom. Therefore, all of the claims against this defendant could be litigated in the United Kingdom.

Thus, because of the burden which would be placed on this defendant it would be unfair to hail this defendant into court in the United States.

I. Whitefriars

Whitefriars is not amendable to service. If it were amenable to service, such service would most likely run afoul of the Due Process Clause.

The Trustee bases its claim of jurisdiction over this defendant on the conspiracy theory and on the grounds it is an affiliate of IBZ.

As discussed above, the actions of affiliates are not attributable to a defendant unless the affiliate is the alter ego of the defendant. *Chan v. Society Expeditions, Inc., supra.*

While the trading slips Whitefriars sent to Gulf in connection with the Sexton trades and the opinion letter sent to Gulf with regard to the Storehouse purchase might be sufficient to establish specific personal jurisdiction for these two transactions, and the conspiracy theory might otherwise support jurisdiction, the seven factors set forth in *Lake v. Lake* show that exercise over these defendants would not be "reasonable" or "comport[ ] with fair play and substantial justice." This defendant did not interject itself into the United States and the transactions all took place in the United Kingdom. The only real tie to the United States is the location of Gulf, and Gulf was only indirectly injured by these transactions as a shareholder in the injured Gulf subsidiaries.

Whitefriars' contact with the United States is minimal. Whitefriars does not have special knowledge of United States law or customs. Nor is there any evidence that it regularly conducts business abroad. Thus there would be an enormous burden on these defendants to litigate these claims in the United States.

All of the transactions alleged against this defendant took place in the United Kingdom. Therefore, all of the claims against this defendant could be litigated in the United Kingdom.

Thus, because of the burden which would be placed on this defendant it would be unfair to force this defendant into court in the United States.

J. Monaco

Monaco is not amendable to service. If it were amenable to service, such service would violate the Due Process Clause

because Monaco lacks sufficient contacts with the United States.

The only United States contacts with regard to the Storehouse transaction alleged by the Trustee are the fairness statement issued by Whitefriars and the actions of Rowland. As discussed previously the Trustee has failed to establish that Monaco was a member of the conspiracy to loot Gulf.

Nor has it been shown that Rowland is otherwise an agent of Monaco.

The Trustee has submitted evidence that Monaco sent a letter to Gulf's board of directors in Massachusetts. The letter states that Rowland had an interest in the Storehouse transaction and requests approval for the transaction under the Rowland Standstill Agreement. The letter makes no representations concerning the fairness or propriety of the agreement. I do not believe this single letter is sufficient to establish minimum contacts with the United States for the purposes of the Storehouse transaction, as the actual purpose took place in New Zealand and there is no evidence Monaco attempted to solicit the sale in the United States.

Therefore, the exercise of personal jurisdiction over Monaco would violate the Due Process Clause.

K. Hockey-Sweeney

Hockey-Sweeney is not amenable to service of process under the Idaho long-arm statute.

Hockey-Sweeney's United States contacts are insufficient to establish general jurisdiction in the United States.

However, the Gulf minutes for the April 16, 1991, Board Meeting in Boston Massachusetts (held several months after the Aviva purchase was completed) show that Hockey-Sweeney attended the Board Meeting and gave the Board a presentation on Aviva. Friedman Aff. Ex.L. These minutes are unsigned and Friedman was not at the meeting and therefore does not have personal knowledge of what transpired at the meeting. In any case, the meeting accrued after the alleged fraudulent transfer had taken place. Further, Hockey-Sweeney

attended the meeting in his capacity as Chairmen of Aviva. There is no indication that Hockey-Sweeney made any misrepresentations at the meeting. Accordingly, pursuant to *Idaho Potato Commission* Hockey-Sweeney's presentation to the Board does not have any jurisdictional impact on Hockey-Sweeney.

Accordingly, the exercise of jurisdiction over Hockey-Sweeney would violate Due Process.

L. Lacey

Lacey is not amenable to service by a bankruptcy court located in Idaho. However, had this action been brought in a state whose long-arm statute reached Lacey, that court's assertion of personal jurisdiction would not violate due process.

The Trustee brings this action against Lacey for transactions arising out of his tenure as director and Chief Executive Officer of Gulf. Gulf is a Delaware corporation and its headquarters were in the United States throughout Lacey's term as and Director and officer of Gulf. Lacey attended many Board Meetings in the United States. He oversaw Gulf's compliance with United States tax, securities and environmental protection laws.

In connection with Nycal's purchase of the Gulf stock, which enabled Lacey to become a Gulf director, he entered into a Governance Agreement that submitted him to the jurisdiction of the United States.

Thus, Lacey reached out to Gulf in the United States and forged an continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located, incorporated and headquartered.

The allegations against Lacey are that he took advantage of his fiduciary relationship to defraud Gulf and steal its assets. The alleged injuries arise directly out of his relationship with Gulf. The Board's decisions to authorize the alleged transactions took place in the United States. Accordingly, the

alleged injuries arise out of the defendant's purposeful direction of his activities toward the United States

Based on a similar long term relationship, the Supreme Court held that Florida had jurisdiction over a Michigan resident who had never visited Florida. *Burger King, supra.* Therefore, because of Lacey's voluntary and knowing ongoing relationship with a United State's corporation, and not the foreseeability of injury alone, Lacey meets the first two elements of the due process test.

Accordingly, this Court has personal jurisdiction over Lacey if after consideration of the seven *Lake* factors this Court determines the exercise of jurisdiction is "reasonable" and "comports with fair play and substantial justice." *Lake v. Lake*, 817 F.2d at 1421.

As discussed above, Lacey has purposefully interjected himself into the United States. He worked for a U.S. corporation for over two years. During that period, he traveled to the United States to hold Board Meetings and conduct other corporate business. The allegations against Lacey arise out of that employment. Thus, the extent to which the defendant has interjected himself into the United States is substantial.

The Court recognizes that the burden on Lacey to litigate in the United States rather than in the Isle of Man is substantial. However, Lacey has acted as an officer and director of a United State's corporation and has assisted that corporation in carrying out its duties under United States law. He is therefore presumptively more familiar with the law of the United States then his nationality would indicate.

Lacey suggests the controversy is governed by foreign law because the purported settlement agreement the Rowland Directors entered into with Gulf is governed by English law and many of the transfers underlying the debtors' fraudulent conveyance claims are governed by foreign law. However, the fraudulent conveyance law which is determinative of whether either these transactions or the settlement agreement are avoidable is federal law.

Additionally, I would note that although the settlement agreement may be dispositive of Gulf's prepetition claims against Lacey, such as breach of fiduciary duty, waste, and breach of contract, it is not dispositive of the fraudulent conveyance claims. At the time the settlement agreement was entered into the state law fraudulent conveyance claims belonged to Gulf's creditors, not Gulf prepetition and no one had standing to bring the federal fraudulent conveyance claims. Post-petition, both the state and federal fraudulence conveyance claims belong to the estates of the debtors, not the debtors, and may be brought only by a chapter 11 trustee or the debtors-in-possession. As these claims do not and never had belonged to the Gulf, these claims could not have been settled by Gulf. Consequently, the settlement agreement has no application to these federal fraudulent conveyance claims. Therefore, the extent of conflict with the laws of a foreign sovereign is not as great as suggested by the Rowland Directors.

The application of the remaining factors do not differ in their application from the above analysis concerning the Rowland Directors and INOCO.

Accordingly, after considering all seven factors, I conclude the assertion of personal jurisdiction over Lacey is reasonable.

IV. Service

A. Service Under 7004(b): Horn

Horn contends he has not been properly served. Rule 7004(b)(1) provides:

> Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4 (c)(2)(C)(i) and (d) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:
>
> > (1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or

> usual place of abode or to the place where the individual regularly conducts a business or profession.

Fed.R.Bankr.Pro. 7004(b)(1).

According to his affidavit, Horn resides and conducts business at 6239 Hopewell Road, The Plains, Virginia. Gulf's schedule of creditors lists Horn at this address. However, none of the Trustee's three attempts to serve Horn have been made to this address. The Trustee's first attempt to make service of process was by mailing a copy of the complaint and summons to Horn at P.O. Box 434, The Plains, Virginia. The Trustee has also attempted service by mail to the following two addresses: (1) William C. Horn, c/o NYCAL Corporation, 30-50 K Street, N.W., Suite 310, Washington, D.C. and (2) 3309 Brooklawn Terrace, Chevy Chase, MD. According to Horn's affidavit, none of these three addresses is either Horn's usual place of abode or the place where he usually conducts his business. The Trustee has submitted certificates of service, but has not submitted any evidence regarding the location of Horn's abode or the place where he usually conducts his business.

The plaintiff has the burden of showing that the court has personal jurisdiction over the defendants. *Data Disc., Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Accordingly, I conclude the Trustee has not properly served defendant Horn.

F.R.Civ.P. Rule 4(j), incorporated by F.R.Bankr.P. 7004(a) provides:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

F.R.Civ.P. 4(j).

It has been more than 120 days since the complaint was filed. Defendant Horn has not yet been properly served.[16] The Trustee has not filed an affidavit showing or made other argument that good cause exists. Application of F.R.Civ.P. 4(j) is mandatory. *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); *Kaczmarcizik v. Van Meter (In re Van Meter)*, 175 B.R. 64, 69 (9th Cir. B.A.P. 1994) (applying Rule 4(j) to an adversary proceeding). Therefore, this adversary proceeding is dismissed without prejudice as to defendant Horn.

B. Rowland

Defendant Rowland has moved to dismiss on the grounds he has never been served with a copy of the summons and complaint. The Trustee contends he has properly served Rowland on two separate occasions.

First, on February 7, 1995, a copy of the summons and complaint was pushed through the letter box at 16 South Eaton Place, London, England. This address is Rowland's London residence and is an office of INOCO. Aff. Vaughan. Rule 3 of Order 69 of the Rules of the Supreme Court of England, governing "Service of Foreign Process," incorporates the provisions of Order 10 Rule 1(2)(b) regarding "service by insertion through a letter box" at a defendant's "last known address". Supreme Court of England Rule 1(2)(b) provides:

> A writ for service on a defendant within the jurisdiction may, instead of being personally served on him, be served . . . if there is a letter box for that address, by inserting through the letter box a copy of the writ enclosed in a sealed envelope addressed to the defendant.

Rowland contends this service was improper because he also has an address in Monaco, known to the Trustee, and he

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[16] The Trustee mailed the service and summons to Horn at his residence at 6239 Hopewell Road, The Plains, Virginia 2271 on June 19, 1995. However, this attempt at service was made long after the 120 day period had run.

was not within England at the time the writ was served. The Trustee cites the affidavit of Peter John Fitzpatrick, an admitted Solicitor of the Supreme Court of England and Wales, for the proposition that it is not necessary that defendant be a resident of England or that he actually be in England at the time service is made. However, his affidavit is submitted in response to the affidavit of Paul Mallalieu Stanley, a barrister licensed to practice in England and Wales who reaches the opposite conclusion. Neither gentlemen has attached copies of the English legal authority upon which he relies in his affidavit. Nor are we able to otherwise obtain copies of these cases. Accordingly, I am unable to make an informed decision as to which statement of English law is correct.

Second, the Trustee contends Rowland was properly served in Monaco on February 23, 1995, Ms. Claire Notari, the *huissier* (process server) of the Monaco Court of Appeal, went to Rowland's Monaco residence at 49, Avenue de L'Annonciade. No one was present at this residence. Thereafter, a copy of the summons and complaint was deposited at Monaco City Hall and a registered letter, notifying Rowland of the documents' existence and contents was sent to Rowland at his Monaco address. Rowland has testified that he has received a card telling him that he has a registered letter, but that he has not taken any action to collect the registered letter.

Rowland contends that he has not been served because he has not signed for the letter. The declaration of Simon C. Groom, a solicitor practicing in Monaco, supports this interpretation of Monaco law. The Trustee contends the Affidavit of Claire Notari, dated June 26, 1995 and submitted with Plaintiffs' Sur-Reply Memorandum of Law in Opposition to Motion to Dismiss, contradicts Groom's affidavit and impugns his credentials. However, no such affidavit is either docketed or in the file. Accordingly, I am unable to determine at this time whether Rowland has been properly served under either the law of England or the law of Monaco. However, for the reasons discussed below the Trustee's attempt to serve

Rowland in Monaco was untimely.

C. Worldwide Service by Mail: INOCO

Rule 7004(e) authorizes service in accordance with F.R.Civ.P. 4(d)(1)-(3). F.R.Civ.P. 4(d)(1) and (3) do not authorize service by mail. Therefore, INOCO contends it may not be served by mail.[16]

However, Rule 7004(a) incorporates F.R.Civ.P. 4(e) and (i). Rule 4(i) only applies to service on a party in a foreign country.

Like service under Rule 7004(e), service under Rule 4(i) is limited to persons amendable to service under the statutes listed in F.R.Civ.P. 4(e). This Court has already held that INOCO is amendable to service under the Idaho long-arm statute, a statute listed under Rule 4(e). Accordingly, the Trustee could properly serve INOCO by mail pursuant to Rule 4(i)(D).

D. Application of the 120 Day Rule to Service Abroad

Each of the Rowland Directors and INOCO have moved to dismiss pursuant to F.R.Civ.P. Rule 4(j) on the grounds they were not served within 120 days of the filing of the complaint. The last sentence of F.R.Civ.P. Rule 4(j) provides:

> This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

F.R.Civ.P. 4(j).

All of these defendants were served pursuant to Rule 4(i). All of the defendants were served in a foreign country. Therefore, Rule 4(j) does not apply to any of the moving defendants except Horn. *Lucas v. Natoli,* 936 F.2d 432, 432 (9th Cir. 1991), *cert denied,* 502 U.S. 1073, 112 S.Ct. 971, 117 L.Ed.2d. 136 (1992) ("the plain language of Rule 4(j) makes

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[16] Service on INOCO cannot be made pursuant to Rule 7004(b) because service under this Rule is limited to service within the United States.

the 120-day service provision inapplicable to service in a foreign country. . . ").

Nevertheless, the Rowland Directors contend where service is made pursuant to the Hague Convention, the 120 day rule applies. The majority of courts considering the issue have held that the 120 service limitation does not apply to service under the Hague Convention.[17]

As explained by the court in *Frederick v. Hydro-Aluminum S.A.*, 153 F.R.D. at 124, Rule 4(i) implicitly contemplates service under the Hague Convention. Therefore, service under the Hague Convention, like service under Rule 4(j) generally is not subject to the 120 day rule. *Id.* Rule 4(i)(A)'s statement that service may be made, "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction for that country" and subsection (B)'s statement that service may be made "as directed by foreign authority" implicitly includes service pursuant to treaty. Therefore, service under the Hague Convention is service under Rule 4(i) and the 120 day rule does not apply to such service.

Accordingly, these defendants are not entitled to dismissal for failure to serve within 120 days.

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[17] *See, Cargill Ferrous International v. Elikon*, 154 F.R.D. 193, 195 (N.D.Ill. 1994) (holding in *dicta* that Rule 4(i) exception to Rule 4(j) does apply to service under the Hague Convention and therefore service may be made after the 120 day period); *Frederick v. Hydro-Aluminum, S.A.*, 153 F.R.D. 120, 126 (E.D.Mich. 1994) (holding that Rule 4(i) includes service under the Hague Convention and therefore service under the Hague Convention need not be made within 120 days); *Fox v. Regie Nationale Des Usines Renault*, 103 F.R.D. 453, 454 (W.D.Tenn.1984) (there is no indication that the Hague Convention was intended to supersede the flexible time scheme contemplated by Rule 4(i)). *C.f. Chilean Nitrate Corp v. M/V HANS LIONHARDT*, 810 F.Supp. 732, 735 (E.D.La. 1992) (citing *Foster v. Dentaurum, Inc.*, Civ.A. No. 85085-4432, 1986 WL 20899 at *1 (D.Kan., Sept. 17, 1986) for the proposition that service under Rule 4(i) does not include service under the Hague Convention and therefore the 120 day rule applies to service under the Hague Convention).

E. The Application of the 10 day Rule to Personal Service Abroad

The Rowland, Moran, James, and Hudd also contend they are entitled to dismissal because they were not served within ten days of the date the summons was issued. F.R.Bankr P. 7004(f) provides:

> If service is made pursuant to Rule 4(d)(1)-(6) F.R.Civ.P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

However, the defendants were not served pursuant to Rule 4(d)(1)-(6). Therefore Rule 7004(f) is inapplicable to the service of these defendants. *Venergia, C.A. v. Honigman (In re Honigman)*, 141 B.R. 69 (Bankr.P.A. 1992).

Accordingly, the motions to dismiss for improper service of James, Hudd, and Moran are hereby denied.

F. Application of the 10 Day Rule to Service By Mail

The Monaco attempt at service on Rowland was made by mail. The first attempt at service on INOCO was also by mail. These defendants contend that the second sentence of Rule 7004(f) requires that the summons and complaint be mailed within 10 days of issuance, regardless of whether service is made under Rule 4(d)(1)-(6).

The methods described in Rule 4(d)(1)-(6) require personal delivery and in some instances also requires service by mail. Thus, if the second sentence of Rule 7004(f) were also limited to service under Rule 4(d)(1)-(6) it would have little or no application. On the other hand, Rule 7004(b) provides ten instances in which service may be made by mail. There is no time limit other than Rule 7004(f) provided for service under

Rule 7004(b). Clearly, Rule 7004(f) provides a time limit for service under Rule 7004(b).

However, these defendants were served under Rule 4(i). As discussed above, there is generally no time limit for service under Rule 4(i). However, the plain language of Rule 7004(f) applies to service by mail regardless of which rule such service is made under. Further, the policy reasons for allowing additional time for service of foreign defendants have to do with the difficulty of obtaining personal service. There is little or no additional difficulty involved in mailing to a defendant located abroad. Accordingly, I conclude the 10 day rule applies to service under Rule 4(i).

Therefore, the first attempt to serve INOCO and the attempt to serve Rowland in Monaco are quashed. However, as discussed above, the 10 day rule does not apply to the London attempt on service of Rowland or the second attempt to serve INOCO.

CONCLUSION

Monaco, IBZ, IBZ Securities, Whitefriars, McKenzie, Wynn Williams, Matson, Brierley, Hockey-Sweeney and Lacey are not amenable to service of process. Even if these defendants were amenable to service of process, the exercise of jurisdiction over all of these defendants except Lacey would violate due process. Accordingly, the motions to dismiss for lack of personal jurisdiction of Monaco, IBZ, IBZ Securities, Whitefriars, McKenzie, Wynn Williams, Matson, Brierley, Hockey-Sweeney and Lacey are granted. The remaining motions filed by these defendants are moot and are therefore denied.

Horns's motion to dismiss for lack of personal jurisdiction is denied. Horn's motion to quash service is granted for failure to serve a copy of the summons and complaint within 120 days of the filing of the complaint. Therefore, the amended complaint is dismissed as to defendant Horn. Horn's remaining motions are moot and are therefore dismissed.

The Rowland Directors' motion to dismiss for lack of personal jurisdiction are granted with regard to the torts of corporate waste and mismanagement; the motion to dismiss is denied with regard to Defendants James, Moran, and Hudd and all other counts.

The motions to quash service of James, Moran and Hudd are denied. Defendant Rowland's motion to quash service will remain under advisement pending receipt of the additional materials concerning English law. Rowland and the Trustee shall each have 30 days to submit the appropriate materials. If the Trustee does not submit the requested information within 30 day, Rowland's motion to dismiss will be granted without further hearing.

INOCO's motion to dismiss for lack of personal jurisdiction is denied as is its motion to quash service.

Dated this 29th day of September, 1995.

ALFRED C. HAGAN

ALFRED C. HAGAN
U.S. BANKRUPTCY JUDGE

FORMER BANKRUPTCY RULE 7004

Process; Service of Summons, Complaint

(*a*) *Summons; Service; Proof of Service.* Rule 4(a), (b), (c)(2)(C)(i), (d), (e) and (g)-(j) F.R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(d) F.R. Civ. P. may be made by any person not less than 18 years of age who is not a party and the summons may be delivered by the clerk to any such person.

(*b*) *Service by First Class Mail.* Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(c)(2)(C)(i) and (d) F.R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such defendant in the courts of general jurisdiction of that state. The summons and complaint in such case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one autho-

rized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint to the United States attorney for the district in which the action is brought and also the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to such officer or agency.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action

is brought against such defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(c) *Service by Publication.* If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(d) or (i) F.R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail postage prepaid, to the party's last known address and by at least one publication in such manner and form as the court may direct.

(*d*) *Nationwide Service of Process.* The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(*e*) *Service on Debtor and Others in Foreign Country.* The summons and complaint and all other process except a subpoena may be served as provided in Rule 4(d)(1) and (d)(3) F.R. Civ. P. in a foreign country (A) on the debtor, any person required to perform the duties of a debtor, any general partner of a partnership debtor, or any attorney who is a party to a transaction subject to examination under Rule 2017; or (B) on any party to an adversary proceeding to determine or protect rights in property in the custody of the court; or (C) on any person whenever such service is authorized by a federal or state law referred to in Rule 4(c)(2)(C)(i) or (e) F.R. Civ. P.

(*f*) *Summons: Time Limit for Service.* If service is made pursuant to Rule 4(d)(1)-(6) F.R. Civ. P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(*g*) *Effect of the Amendment to Rule 4 F.R. Civ. P.* The subdivisions of Rule 4 F.R. Civ. P. made applicable by these rules shall be the subdivisions of Rule 4 F.R. Civ. P. in effect on January 1, 1990, notwithstanding any amendment to Rule 4 F.R. Civ. P. subsequent thereto.

(*h*) *Service of Process on an Insured Depository Institution.* Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

(1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

REVISED BANKRUPTCY RULE 7004

Process; Service of Summons, Complaint

(*a*) *Summons; Service; Proof of Service.* Rule 4(a), (b), (c)(1), (d)(1), (e) – (j), (l), and (m) F.R. Civ. P. applies in adversary proceedings. Personal service pursuant to Rule 4(e) – (j) F.R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(*b*) *Service by First Class Mail.* Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e) – (j) F.R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to the individual's dwelling house or usual place of abode or to the place where the individual regularly conducts a business or profession.

(2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one autho-

rized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by mailing a copy of the summons and complaint to the person or office upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state, or in the absence of the designation of any such person or office by state law, then to the chief executive officer thereof.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if a copy of the summons and complaint is mailed to the entity upon whom service is prescribed to be served by any statute of the United States or by the law of the state in which service is made when an action is brought against such a defendant in the court of general jurisdiction of that state.

(8) Upon any defendant, it is also sufficient if a copy of the summons and complaint is mailed to an agent of such defendant authorized by appointment or by law to receive service of process, at the agent's dwelling house or usual place of abode or at the place where the agent regularly carries on a business or profession and, if the authorization so requires, by mailing also a copy of the summons and complaint to the defendant as provided in this subdivision.

(9) Upon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in a filed writing and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

(10) Upon the United States trustee, when the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, by mailing a copy of the summons and complaint to an office of the United States trustee or another place designated by the United States trustee in the district where the case under the Code is pending.

(*c*) *Service by Publication.* If a party to an adversary proceeding to determine or protect rights in property in the custody of the court cannot be served as provided in Rule 4(e) – (j) F.R. Civ. P. or subdivision (b) of this rule, the court may order the summons and complaint to be served by mailing copies thereof by first class mail, postage prepaid, to the party's last known address, and by at least one publication in such manner and form as the court may direct.

(*d*) *Nationwide Service of Process.* The summons and complaint and all other process except a subpoena may be served anywhere in the United States.

(*e*) *Summons: Time Limit for Service.* If service is made pursuant to Rule 4(e) – (j) F.R. Civ. P. it shall be made by delivery of the summons and complaint within 10 days following issuance of the summons. If service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served.

(*f*) *Personal Jurisdiction.* If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service in accordance with this rule or the subdivisions of Rule 4 F.R. Civ. P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to

a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(*g*) [*Abrogated*]

(*h*) *Service of Process on an Insured Depository Institution.*—Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

(1) the institution has appeared by its attorney. in which case the attorney shall be served by first class mail;

(2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or

(3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

1996 U.S. ORDER 96-14 (ORDER OF THE SUPREME COURT OF THE UNITED STATES ADOPTING AND AMENDING RULES, APRIL 23, 1996)

104th Congress, 2d Session House Document 104-204

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2075

[SEAL]

APRIL 24, 1996.—Referred to the Committee on the Judiciary and ordered to be printed.

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1996

[LETTERHEAD OF SUPREME COURT OF THE UNITED STATES]

April 23, 1996

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

William H. Rehnquist

Honorable Newt Gingrich
Speaker of the House of Representatives
Washington, D.C. 20515

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, and 9006.

[See *infra*., pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 1996, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

Supreme Court, U.S.
FILED
MAY 12 1998
OFFICE OF THE CLERK

Nos. 97-1683 and 97-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD W. REINTHALER*
JANIS M. MEYER
RICHARD B. SYPHER
DIANNE COFFINO
BRETT T. GOODMAN
DEWEY BALLANTINE LLP
1301 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10019-6092
(212) 259-8000

TERRY L. MYERS
RAMONA S. NEAL
GIVENS PURSLEY LLP
SUITE 200, PARK PLACE
277 NORTH SIXTH STREET
BOISE, IDAHO 83701
(208) 342-6571

* Counsel of Record

Attorneys for Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as Trustees

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COUNTER-STATEMENT OF QUESTION PRESENTED

Should *certiorari* be granted in order to determine whether the Court of Appeals *abused its discretion* in finding -- in the words of this Court's Order adopting revised Bankruptcy Rule 7004(f) -- that it was "just and practicable" to apply the revised rule to this action in order to determine whether personal jurisdiction existed over Petitioners, particularly where, as here:

- the Court of Appeals' decision is not contrary to Supreme Court precedent and does not present a conflict among the circuits;

- the question presented is not crucial to the ultimate disposition of the case, as there exist several other non-constitutional grounds upon which the decisions below can be affirmed; and

- Petitioners face no substantive consequences as the result of what Petitioners erroneously contend is a "retroactive" application of a rule that in any event supplies only an additional basis for upholding jurisdiction over them.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller are the trustees of a litigation trust established under the laws of, and resident in, the State of Idaho. (A 63a.) The litigation trust was formed for the purpose of prosecuting the claims asserted in an amended complaint filed in the United States Bankruptcy Court for the District of Idaho on November 30, 1994, on behalf and for the benefit of substantially all of the unsecured creditors of Gulf USA Corporation and its wholly owned subsidiary, Pintlar Corporation, reorganized debtors. (A 36a-37a, 39a.) None of the Respondents, nor the litigation trust, has any parent or subsidiary companies.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FOR RESPONDENTS BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY AND JAY J. MILLER, AS TRUSTEES

Respondents Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller (the "Trustees") respectfully request that this Court deny the petitions for writs of *certiorari* filed by David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran (the "Rowland Directors") and Inoco Plc ("Inoco," and, together with the Rowland Directors, "Petitioners"), which seek review of the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Pursuant to Rule 15.1 of the Rules of this Court, the Trustees provide the following statement of the case to correct the misstatements contained in the petitions filed by the Rowland Directors and Inoco.

A. Overview

In 1989, Petitioners -- foreign investors with a prior track record of engaging in speculative investments for the primary purpose of enriching themselves at the expense of others -- seized control of Gulf USA Corporation ("Gulf"),[1] formerly known as Gulf Resources and Chemical Corporation, an insolvent natural resources company that had, through liquidation of its principal business units, amassed $177 million in cash reserves.[2] (A 36a-37a.) These funds could (and should)

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[1] Gulf and its wholly owned subsidiary, Pintlar Corporation ("Pintlar"), together are referred to herein as "Gulf" or the "Company."

[2] Technically, a wholly owned subsidiary of Inoco named Downshire, N.V., purchased a 34 percent stake in Gulf. At the time of the purchase, Rowland held a controlling interest in Inoco through his family trust, and Rowland, along with Hudd, James and Moran, were officers of Inoco. (A 36a.)

continued on the following page...

have been used to satisfy substantial obligations relating to remedial and natural resource damages owed to the United States Environmental Protection Agency (the "EPA"), the Coeur d'Alene Indian Tribe and other environmental creditors,[3] pension and medical benefits to Pintlar's retirees, and bond-related and other debt owed to Gulf's creditors, located primarily in Idaho. (A 36a-37a, 86a.) Instead, as the amended complaint alleges, Petitioners systematically bled Gulf dry, removing assets from the United States (and away from creditors), committing millions of dollars to precarious or fraudulent stock trades, engaging in risk-laden real estate transactions halfway around the world, and lining their own pockets with the Company's money. (A 37a-39a, 87a-100a.) Over a 27-month span, Petitioners succeeded in reducing Gulf's cash reserves by more than $125 million before selling their interest in the Company and fleeing the United States. Id. Within two years, Gulf's bankruptcy ensued,[4] leading to the formation of the litigation trust and the commencement of this action, which seeks redress for the massive losses suffered by the Company's creditors. (A 39a.)

As the United States Bankruptcy Court for the District of Idaho correctly concluded (A 140a-146a) -- and as two appellate courts have acknowledged -- *there is no jurisdiction in the world better suited than the District of Idaho* to adjudicate the claims

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...*continued from the preceding page*

Upon the closing of the purchase, all four individuals also became officers and directors of Gulf as well. (A 37a.)

[3] In 1984, the EPA named Gulf as a potentially responsible party for the extensive environmental damage that had occurred at the Bunker Hill mining site (the "Bunker Hill Site") in Idaho -- one of *the* largest, if not the largest, SuperFund sites in the country -- during the period in which Pintlar owned and operated the site. (A 36a, 85a-86a.)

[4] In the Company's bankruptcy proceedings, its unsecured creditors submitted proofs of claims -- all of which were ultimately approved -- in excess of $1.6 *billion*.

asserted in this adversary proceeding. The victims of Petitioners' wrongdoing were principally located in Idaho; Petitioners' conduct was purposefully directed at Idaho; and Idaho suffered by far the greatest financial impact of Petitioners' fraudulent scheme. (A 54a-55a.)

Both the Bankruptcy Court and the District Court held that jurisdiction over Petitioners existed under Idaho's long-arm statute. The Court of Appeals recognized, however, that the exercise of jurisdiction here may be predicated on federal law without reference to the Idaho long-arm statute. This is because of revised Bankruptcy Rule 7004(f). On December 1, 1996, during the pendency of the instant action, Bankruptcy Rule 7004(f) was revised to make clear that bankruptcy courts may exercise jurisdiction over foreign defendants, such as Petitioners, provided that the exercise of jurisdiction comports with due process.[5] In such cases -- where federal law supplies the basis for personal jurisdiction and authorizes worldwide service of process -- due process is satisfied when defendants are shown to have sufficient aggregate contacts with the United States as a whole, not just with any particular state. In its Order adopting the revisions to the Bankruptcy Rules, this Court expressly stated that revised Bankruptcy Rule 7004(f) may be applied to pending cases such as the instant action "insofar as just and practicable." (A 181a.) Thus, where, as here, Petitioners have sufficient aggregate contacts with the United States, the exercise of

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[5] In relevant part, revised Bankruptcy Rule 7004(f) states:

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons . . . in accordance with this rule or the subdivisions of Rule 4 F.R.Civ.P. made applicable by these rules is effective to establish personal jurisdiction over the person of any defendant with respect to a case under the Code or a civil proceeding arising under the Code, or arising in or related to a case under the Code.

(A 177a-178a.)

jurisdiction under revised Bankruptcy Rule 7004(f) comports with due process.

B. The Decisions Below

On November 30, 1994, an amended complaint (the "Complaint") was filed in the Bankruptcy Court against certain of Gulf's former officers and directors and their affiliated corporate entities, including Petitioners.[6] As a basis of recovery against Petitioners, the Complaint asserted various legal theories arising out of Petitioners' scheme, including, without limitation, fraudulent conveyance, civil conspiracy, breach of fiduciary duty, corporate waste, mismanagement, misrepresentation and breach of contract.[7] (A 6a.)

1. The Bankruptcy Court

In early 1995, Petitioners moved to dismiss the Complaint for lack of personal jurisdiction and insufficiency of service. (A 83a.) On September 29, 1995, the Bankruptcy Court held that

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[6] Petitioners mislead this Court when they contend that the Ninth Circuit's decision revived claims that would otherwise be barred under the applicable statute of limitations. Rowland Directors' Petition (the "RD Petition") at 7; *see also* Inoco Petition at 15. The statute of limitations was tolled upon the timely filing of the original complaint on January 27, 1994 and continues to be tolled during the pendency of this action against Petitioners.

[7] In a misleading attempt to convince this Court that they have been absolved of all liability, Petitioners note that a different release they received from another entity at the same time they received a release from the Company has been upheld by a different judge in a different jurisdiction in an unrelated case in which neither Gulf nor the Trustees were parties. RD Petition at 8 n.5 (citing *Nycal Corp. v. Inoco, Plc.*, 96 Civ. 7159, 1997 WL 774683 (S.D.N.Y. Dec. 12, 1997)). The release in issue in this case was never before that court. Petitioners also ignore the crucial differences between that litigation and this one. Here, the Trustees have maintained from the outset of this case that the "release" purportedly granted by the Company to Petitioners was voidable as a fraudulent conveyance and, in any event, could (and did) not release claims held by creditors, two arguments that were unavailable to the releasing party in the *Nycal Corp. v. Inoco, Plc.* case.

the Trustees had satisfied their *prima facie* burden[8] of establishing that the Petitioners were subject to personal jurisdiction under the Idaho long-arm statute. (A 114a-124a.) The Bankruptcy Court held that personal jurisdiction existed over Rowland and Hudd for the fraudulent transfer, misrepresentation and civil conspiracy counts in the Complaint because, in furtherance of their scheme to loot Gulf, they made misrepresentations in Idaho and performed out-of-state acts causing injury in Idaho. (A 120a.) The Bankruptcy Court also held that James, Moran and Inoco were subject to personal jurisdiction in Idaho for the fraudulent transfer, misrepresentation and civil conspiracy counts of the Complaint because any misrepresentations made by Rowland and Hudd were attributable to them as co-conspirators. (A 122a-124a.) The Bankruptcy Court also concluded that the exercise of personal jurisdiction over Petitioners under the Idaho long-arm statute accorded with due process based on Petitioners' aggregate contacts with the United States. (A 136a-137a.)[9]

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[8] Because no discovery was taken and no evidentiary hearing was held, the Bankruptcy Court correctly concluded that the Trustees were required to make only a *prima facie* showing of the jurisdictional facts. (A 103a.) Thus, despite the Rowland Directors' claims that they have disputed the allegations against them (RD Petition at 13 n.10 & 15 n.11), the Bankruptcy Court properly placed little emphasis on Petitioners' meaningless, conclusory affidavits in which they denied wrongdoing or participation in a conspiracy while assiduously avoiding any discussion of the facts of the case.

[9] The Rowland Directors err when they state that the Bankruptcy Court "relied entirely on a brief letter" signed by Rowland and "relied solely on a conference purportedly attended by Hudd" in finding that sufficient facts had been pleaded to exercise jurisdiction over these Petitioners. RD Petition at 12-13. In fact, the Trustees submitted, and the Bankruptcy Court relied upon, detailed allegations contained in the 86-page, 265-paragraph Complaint as well as exhibits attached to various affidavits. Although *one* of the allegations in *one* of the affidavits submitted by the Trustees was later corrected by the affiant, the District Court found that the affiant had confirmed the accuracy of all other facts set forth in the affidavit and that, therefore, the admitted error was "not grounds for discounting [the] remaining declarations." (A 39a n.6.)

2. The District Court

The United States District Court for the District of Idaho granted Petitioners leave to pursue an interlocutory appeal. (A 66a-68a.) On August 16, 1996, the District Court affirmed the Bankruptcy Court's decision, albeit on somewhat different grounds.[10] (A 34a-57a.) The District Court held that jurisdiction over Petitioners existed under the Idaho long-arm statute as to all counts in the Complaint -- including a corporate waste and mismanagement count previously dismissed by the Bankruptcy Court -- other than breach of contract. (A 56a.) Relying on well-settled Ninth Circuit and Idaho precedent to the effect that the exercise of personal jurisdiction under the Idaho long-arm statute is intended to extend to the full limits of due process, the District Court applied the Ninth Circuit's three-pronged due process test in concluding that personal jurisdiction existed over Petitioners. (A 48a.) Crediting the allegations of the Complaint and the affidavits and other submissions of the Trustees -- all of which were uncontroverted -- the District Court correctly concluded (*i*) that Rowland, Hudd and James intentionally directed their actions or aimed their conduct at Idaho such that the purposeful availment prong of the Ninth Circuit's due process test was satisfied;[11] (*ii*) that the acts of these defendants could be attributed to Moran and Inoco as co-conspirators; (*iii*) that but for Petitioners' contacts with Idaho, the claims asserted in the Complaint (other than the claim for breach of contract) would not have arisen; and (*iv*) that the exercise of personal

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[10] In important *dicta*, the District Court recognized the possibility that jurisdiction might exist over Petitioners pursuant to federal law – in addition to the Idaho long-arm statute – once revised Bankruptcy Rule 7004(f) became effective on December 1, 1996. (A 45a n.9.)

[11] The District Court's application of the well-established "effects" test renders moot Petitioners' protestations that they have "no contact with the State of Idaho" (Inoco Petition at 3) and that none of the commercial transactions described in the Complaint "occurred in Idaho or involved Idaho residents or entities." RD Petition at 9.

jurisdiction over Petitioners in Idaho was, under all the circumstances, reasonable. (A 48a-56a.)

3. The Court of Appeals

Petitioners again sought and obtained leave to appeal. During this time, revised Bankruptcy Rule 7004(f) became effective. Thus, the Trustees advanced before the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. In addition to providing alternative theories of jurisdiction predicated on the Idaho long-arm statute, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) definitively supported the exercise of personal jurisdiction over Petitioners under federal law. Specifically, the Trustees demonstrated that revised Bankruptcy Rule 7004(f) was expressly amended to permit the exercise of jurisdiction over a foreign defendant "in a civil proceeding arising under the Code or arising in or related to a case under the Code," provided that the exercise of jurisdiction was consistent with due process, based on the defendant's aggregate contacts with the United States as a whole. Because Petitioners had sufficient aggregate contacts with the United States to satisfy due process -- a point the Rowland Directors conceded -- the Trustees argued that the exercise of jurisdiction over them was appropriate under the revised rule.

In an amended opinion issued on January 14, 1998, the Court of Appeals concurred with the Trustees' analysis of the applicability of revised Bankruptcy Rule 7004(f).[12] (A 1a-14a.) As a threshold matter, the Court found the application of the

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[12] Petitioners mischaracterize the Ninth Circuit's decision, claiming that the Ninth Circuit "[n]o doubt recogniz[ed]" that jurisdiction could not be predicated on the Idaho long-arm statute and therefore limited its analysis to revised Bankruptcy Rule 7004(f). RD Petition at 3; Inoco Petition at 3. In actuality, the Ninth Circuit simply concurred with the Trustees' view that Bankruptcy Rule 7004(f) was dispositive on its face, thereby eliminating the need to review the findings below with respect to the Idaho long-arm statute.

revised rule appropriate, stating that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." (A 10a (quoting *Landgraf v. USA Film Prods.*, 511 U.S. 244, 274 (1994) (internal quotation marks omitted)).) Moreover, the Court of Appeals concluded that the application of revised Bankruptcy Rule 7004(f) to the instant action would be "just and practicable" -- in the words of this Court's Order adopting the revised rule -- because Petitioners' argument that they could not reasonably have expected being haled into court in Idaho was unpersuasive since they had at least to reckon with application of the Idaho long-arm statute to their dealings affecting Idaho creditors. None of the defendants offered facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced. (A 11a (citing *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957)).)

Applying revised Bankruptcy Rule 7004(f) to the instant case, the Court of Appeals noted that "the Rowland Directors do not contest the constitutional basis for personal jurisdiction" over them but acknowledged that "Inoco contends that it lacked sufficient contacts with the United States." (A 13a.) In holding that jurisdiction could be properly exercised over all Petitioners, however, the Court of Appeals deferred to the findings of fact made by the Bankruptcy Court (and confirmed by the District Court):

> [T]hese alien defendants reached out to Gulf in the United States and forged a continuing relationship with it. The alleged looting of Gulf foreseeably caused Gulf injury in the United States where it was located. . . . [T]he alleged injuries arise out of the defendants' purposeful direction of their activities toward the United States.

(A 13a.)

REASONS FOR DENYING THE PETITIONS

What Petitioners are requesting is for the Court to examine a record already carefully inspected by no fewer than three other federal courts and conclude that the Court of Appeals abused its discretion when it found that it was "just and practicable" -- in the words of this Court's own Order -- to apply Bankruptcy Rule 7004(f) to these facts in upholding the exercise of personal jurisdiction over Petitioners. Because the question presented by Petitioners is concededly one of first impression that has not been decided by any federal court other than the Ninth Circuit, much less created a split among the circuits; because no important question of constitutional interpretation is essential to the outcome of this case and there exist at least two alternative grounds upon which the same substantive result could be reached if this Court were to reverse and remand; and because the Ninth Circuit's decision is fundamentally correct, the petitions for writs of *certiorari* should be denied.[13]

A. The Decision Below Is Not Contrary To Supreme Court Precedent And Does Not Present A Conflict Among The Circuits Requiring This Court's Attention

In its decision affirming the exercise of jurisdiction over Petitioners, the Court of Appeals relied, *inter alia*, on two Supreme Court precedents, *Landgraf* and *McGee*, in finding that the application of revised Bankruptcy Rule 7004(f) to this case comported with due process. (A 10a-11a.) Significantly, in urging the Court to issue writs of *certiorari*, Petitioners fail to allege that either of these precedents was in any way wrongly decided. Rather, Petitioners meekly claim that the Court of Appeals "mechanically appl[ied] dictum" from *Landgraf* in

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[13] "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment" below. *Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Although the Trustees' dispute Petitioners' claim that the Ninth Circuit's opinion was wrongly decided, the petitions should be denied for a variety of additional reasons.

reaching an incorrect conclusion. RD Petition at 18; Inoco Petition at 15.

Petitioners point, however, to no other federal court decision that analyzes similar issues and reaches a different result. In fact, Petitioners concede that this action is the "first and only" time in which the application of revised Bankruptcy Rule 7004(f) has been discussed by any court. *Id.* Contrary to Petitioners' claim that this action "thus is properly before this Court for review," *id.*, it is well-established that such circumstances militate against the issuance of writs of *certiorari*. *See, e.g.*, *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (denying *certiorari*) ("There is presently no conflict of decision with the federal system. . . . [I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.") (Stevens, J.). For this reason, the petitions should be denied.

B. The Question Presented To This Court By Petitioners Is Not Crucial To The Ultimate Disposition Of This Case, As There Exist Several Separate Non-Constitutional Grounds Upon Which The Same Result Can Be Reached

As noted above, the Trustees offered to the Court of Appeals no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed. At the Trustees' urging, the Court of Appeals embraced the least complicated of the three theories (without addressing the others) and found Petitioners subject to the jurisdiction of the Bankruptcy Court under federal law (as opposed to under the Idaho long-arm statue).

Petitioners contend that the Court of Appeals abused its discretion in reaching this result. Even if this Court ultimately were to agree with Petitioners, however, and hold that revised Bankruptcy Rule 7004(f) cannot provide the basis for the assertion of personal jurisdiction over them, there remain two distinct state law rationales that would support the exercise of jurisdiction here. As explained in great detail by both the Bankruptcy Court and the District Court, Petitioners are subject

to jurisdiction under the Idaho long-arm statute based on their actions, both in and outside the State of Idaho, which had intended injurious effects in Idaho. (A 48a-56a, 114a-124a, 132a-146a.) In addition, as both the Bankruptcy Court and District Court correctly found, Petitioners are amenable to suit in Idaho under the conspiracy theory of jurisdiction, a well-established doctrine that is consistent with due process. (A 51a-52a, 121a-124a.) Thus, a remand of this action would not dramatically alter the posture of this case, but rather would likely result in affirmance by the Court of Appeals of the decisions below, albeit on different grounds, pursuant to the Idaho long-arm statute.[14]

In the past, this Court has cautioned that "no matter how much [a party] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 172 (1957) (*per curiam*). Therefore, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* These words apply with force to the instant action. The decision below does not "actually compel[ ]" this Court's review of the propriety of applying revised Bankruptcy Rule 7004(f) to this case. Because the question presented by Petitioners is not "immediately pressing," the writs should be denied.

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[14] Regardless of the ground on which jurisdiction is predicated, Petitioners have made it clear that they have no intention of defending this case on the merits. Rather, their strategy all along has been to default, as their counsel informed the Court of Appeal in England last year. *Inoco Plc and Others v. Gulf USA Corp.*, 1995 I No. 781, Court of Appeal (Eng.), Jan. 22, 1997.

C. This Court Is Not In The Practice Of Reviewing Appellate Decisions Where The Alleged Defect Occurred With Respect To A Finding Of Fact

The question presented to this Court by Petitioners is "[w]hether it was just and practicable" for the Court of Appeals to apply revised Bankruptcy Rule 7004(f) to this case. RD Petition at i; Inoco Petition at i. Of course, the fairness and propriety of applying the revised rule to the instant action was the very same issue before the Court of Appeals itself. After a careful review of the record, that court answered this question in the affirmative. Now, Petitioners attempt to persuade this Court to revisit what was, at its core, an exercise of discretion by the Court of Appeals based on a review of the entire record.

It is this Court's longstanding practice "not [to] grant *certiorari* to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.). Moreover, the Court of Appeals based its findings on factual conclusions drawn by the Bankruptcy Court (and confirmed by the District Court) after its initial review of the Complaint and the various affidavits filed in this action. In such circumstances, "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (citing cases); *see also Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980) ("In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous."). For this reason alone, the petitions should be denied.

D. The Court Of Appeals Did Not Abuse Its Discretion In Determining That It Was "Just and Practicable" To Apply Revised Bankruptcy Rule 7004(f) To This Pending Case

In addition to the above reasons, each of which compels the denial of the petitions in the instant action, the judgment below was, indeed, quite correctly entered.

In 1993, when Federal Rule of Civil Procedure 4(k)(2) was added to authorize, in a federal question case, extraterritorial service upon a foreign defendant not subject to personal jurisdiction in any state, a corresponding revision to the Bankruptcy Rules was not made at that time, thus creating a (presumably inadvertent) gap between the two sets of provisions. On December 1, 1996, this gap was closed when revised Bankruptcy Rule 7004(f) became effective.[15]

The Order of this Court adopting the revisions to the Bankruptcy Rules stated in the clearest of terms that the revised rule should be applied "insofar as just and practicable [to] all proceedings in bankruptcy cases then pending." (A 181a.) As noted above, the Ninth Circuit found that it was "just and practicable" to apply the revised rule here, because the Petitioners did not "offer facts to show that they would have behaved differently had they expected Rule 7004(f) to apply or that they have been otherwise prejudiced." (A 11a.) Before this Court, Petitioners argue that the Ninth Circuit's holding

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[15] The legislative history of the revisions to the Bankruptcy Rules makes clear that the new provisions were meant to be remedial in nature and were promulgated merely to conform the Bankruptcy Rules to the updated version of the Federal Rules. As explained in the Committee Note published in connection with the revised Bankruptcy Rules, the "new subdivision (f) . . . clarifies that service . . . in accordance with this rule or the applicable subdivisions of F. R. Civ. P. 4 is sufficient to establish personal jurisdiction over the defendant." 10 Lawrence P. King, *Collier on Bankruptcy* App. 7004 at 7004-39 (15th ed. rev. 1996). In the instant case, Petitioners were all served in England under the Hague Convention.

There is, however, an important distinction between Federal Rule 4(k)(2) and revised Bankruptcy Rule 7004(f). Under the Federal Rule, jurisdiction is only authorized if it comports with Fifth Amendment due process concerns *and* the defendant is not subject to the jurisdiction of the courts of any particular state. In contrast, the Bankruptcy Rule establishes jurisdiction over a foreign defendant in *any* "civil proceeding arising under the Code or arising in or related to a case under the Bankruptcy Code" and *regardless* of whether the defendant is also subject to the jurisdiction of any particular state. The fact that Petitioners may also be subject to jurisdiction under the Idaho long-arm statute is thus, in a word, irrelevant under Bankruptcy Rule 7004(f).

> overlooks the fact that amended Bankruptcy Rule 7004(f) did not exist at the time factual evidence was submitted to the Bankruptcy Court, so Petitioners never had the opportunity to submit any evidence relating to the applicability of the amended Rule or its effects on Petitioners' conduct.

RD Petition at 17; *see also* Inoco Petition at 18. The Court of Appeals, however, considered and rebuffed this argument, recognizing that Petitioners can make no credible claim that the existence of Bankruptcy Rule 7004(f) between 1989 and 1991 (during Petitioners' stewardship of Gulf) -- much less in 1994, when this action was commenced -- would have caused them to behave differently:

> It is difficult to see how Rule 7004(f) might have induced [Petitioners] into behavior that the long-arm statute did not. The argument, in any event, is not persuasive in light of their failure to give any indication in their briefs or petitions [as to] what facts they might have offered for this purpose.

(A 11a n.2.)

Petitioners consistently refer to the application of revised Bankruptcy Rule 7004(f) to this case as "retroactive," as if their invocation of that word should alone automatically decide the matter in their favor. There is, however, nothing "retroactive" about the application of the revised rule to the instant action, and Petitioners' claim that the Ninth Circuit "has effectively created jurisdiction over [them] where none previously existed" is completely misguided. RD Petition at 3; Inoco Petition at 3-4. First, as previously determined by the Ninth Circuit, the presumption against retroactivity in certain circumstances "generally does not apply to rules conferring or withdrawing jurisdiction." *Arrowhead Estates Dev. Co. v. United States Trustee* (*In re Arrowhead Estates Dev. Co.*), 42 F.3d 1306, 1311 (9th Cir. 1994) (citing *Landgraf*). Further, in direct contrast to Petitioners' claim that the "application of the new Rule to this

case would alter [their] rights" (RD Petition at 18; *see also* Inoco Petition 16), this Court has held that "statutes affecting jurisdiction speak to the power of the court rather than to the rights or obligations of the parties." *Republic Nat'l Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). Therefore, because a court that exercises expanded jurisdiction does *not* burden parties with new consequences to previous actions, the exercise of such power does not implicate "retroactivity" concerns. *See McGee*, 355 U.S. at 224 (holding that an amendment to a long-arm statute "neither enlarged nor impaired respondent's substantive rights or obligations").

In any event, application of Bankruptcy Rule 7004(f) to this case provided an *additional*, rather than the exclusive, basis for upholding jurisdiction over Petitioners. Far from "creating jurisdiction over [them] where none previously existed," the Court of Appeals simply affirmed that, no matter how you analyze the facts -- under the Idaho long-arm statute or under revised Bankruptcy Rule 7004(f) -- Petitioners may be held accountable for their misdeeds, which adversely affected the lives of thousands of Idaho residents, in the Bankruptcy Court.

CONCLUSION

For all of the above-stated reasons, the petitions for writs of *certiorari* should be denied.

Dated: May 12, 1998

Respectfully submitted,
Richard W. Reinthaler*
Janis M. Meyer
Richard B. Sypher
Dianne Coffino
Brett T. Goodman
Dewey Ballantine LLP
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

and

Terry L. Myers
Ramona S. Neal
Givens Pursley LLP
Suite 200, Park Place
277 North Sixth Street
Boise, Idaho 83701
(202) 342-6571

Attorneys for Respondents
Bernard Goodson, Ford Elsaesser, Lowell Finley and Jay J. Miller, as Trustees

*Counsel of Record

ORIGINAL

No. 97-1683

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

Supreme Court, U.S.
FILED
JUN 5 1998
CLERK

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

v.

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON MOTION TO DEFER CONSIDERATION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTICE OF MOTION AND AFFIRMATION IN SUPPORT OF MOTION TO DEFER CONSIDERATION OF PETITION

Lawrence A. Blatte
Counsel of Record
James K. Landau
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran

6 pp

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

v.

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON MOTION TO DEFER CONSIDERATION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOTICE OF MOTION TO DEFER CONSIDERATION OF PETITION

PLEASE TAKE NOTICE, that upon the annexed affirmation of Lawrence A. Blatte dated June 4, 1998 and accompanying affirmation of non-opposition by Respondents dated June 4, 1998, Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran (the "Petitioners") by their attorneys, Rosen & Reade, LLP hereby apply to this Court for an Order deferring consideration of Petitioners' Petition for a Writ of Certiorari (the "Petition") in this matter until such time as the Petitioners move for consideration of the Petition to be heard without further delay, or alternatively advise the Court that the Petitioners are withdrawing the Petition.

The reason for this application is that the necessary parties in this case are currently involved in settlement negotiations. It is anticipated that the parties will enter into a settlement agreement this month and that it will be promptly submitted to the United States Bankruptcy Court for the District of Idaho for its approval of the settlement.

The Respondents to the Petition consent to and support the within application.

Dated: New York, New York
June 4, 1998

Lawrence A. Blatte (LB-2977)
Counsel of Record

James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, NY 10017
(212) 303-9000

Counsel for Petitioners
David J. Rowland
Jeremy E. James
David L. Hudd
Derek Moran

In Re:

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AFFIRMATION IN SUPPORT OF MOTION TO DEFER CONSIDERATION OF PETITION

LAWRENCE A. BLATTE, an attorney duly admitted to practice before the Supreme Court of the United States, affirms, under penalty of perjury as follows:

1. I am a member of Rosen & Reade, LLP, attorneys for Petitioners, David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Petitioners") herein. I make this affirmation in support of Petitioners' motion to defer consideration of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (the "Petition") from June

11, 1998 until such time as Petitioners move for the Petition to be heard without further delay or alternatively advise the Court that Petitioners are withdrawing the Petition.

2. The opinion and order of the Court of Appeals was filed on November 3, 1997 and, after rehearing, amended on January 14, 1998. The jurisdiction of this Court to review the opinion and order of the Court of Appeals by Writ of Certiorari is conferred by 28 U.S.C § 1254(1).

3. The Petition dated April 14, 1998, Respondents' Brief in Opposition dated May 12, 1998, and Petitioners' Reply to Brief in Opposition dated May 22, 1998 have all been duly served and filed in this Court.

4. Upon information and belief, this Court will conference the above-mentioned Petition on June 11, 1998.

5. The necessary parties in this case are currently involved in settlement negotiations. It is anticipated that the parties will enter into a settlement agreement this month and that it will be promptly submitted to the United States Bankruptcy Court for the District of Idaho for its approval of the settlement.

6. Therefore, the Petitioners respectfully request that this Court defer consideration of the Petition in this matter until such time as the Petitioners move for consideration of the Petition without further delay, or alternatively advise the Court that the Petitioners are withdrawing the Petition.

7. Respondents consent to and support this motion. The Respondents have filed an affirmation of non-opposition to accompany this motion.

Dated: New York, New York
June 4, 1998

By: _____
Lawrence A. Blatte
(LB-2977)

Counsel of Record

James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran

Supreme Court, U.S.
FILED
MAY 26 1998
OFFICE OF THE CLERK

No. 97-1683

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

Debtors.

DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

Petitioners,

—v.—

BERNARD GOODSON, FORD ELSAESSER, LOWELL FINLEY and JAY J. MILLER, as Trustees,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Lawrence A. Blatte
Counsel of Record
James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1683

In Re:

PINTLAR CORPORATION and GULF USA CORPORATION,

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DAVID J. ROWLAND, JEREMY E. JAMES, DAVID L. HUDD and DEREK J. MORAN,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioners David J. Rowland ("Rowland"), Jeremy E. James ("James"), David L. Hudd ("Hudd") and Derek J. Moran ("Moran," and collectively with Rowland, James and Hudd, the "Petitioners") respectfully submit this Reply to Brief in Opposition in further support of their request that this Court issue a Writ of Certiorari to review the order and opinion of the United States Court of Appeals for the Ninth Circuit filed November 3, 1997 and amended January 14, 1998 in this matter.

PRELIMINARY STATEMENT

Knowing full well that Petitioners' request for a writ of certiorari has merit, Respondents' opposition brief largely avoids the main issue presented—that Petitioners have been denied due process by the Ninth Circuit's retroactive application of Bankruptcy Rule 7004(f), thereby exposing them to potential liability on claims which would have otherwise been time barred by the applicable Statutes of Limitations.[1] Instead, Respondents:

- mischaracterize Petitioners' argument as seeking to prevent the retroactive application of a jurisdictional statute to confer jurisdiction over Petitioners on an otherwise valid action;
- rely on the above mischaracterization to claim that the Ninth Circuit's decision is not contrary to precedent;
- erroneously urge the Court to forego review because the Ninth Circuit is the only Court of Appeals to have decided the issue before the Court on this Petition;
- claim that review should be withheld because two other jurisdictional bases allegedly exist, even though those bases were wrongly relied upon by the lower courts and completely ignored by the Ninth Circuit in rendering its decision below;
- contend that the Court should not review a determination of fact even though no facts have been found by any court, as the issues have been presented in the context of a motion to dismiss; and

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[1] The only mention in Respondents' brief of the fact that the Statutes of Limitations for the underlying claims for relief have run and their claims for relief are time barred is in a footnote in which they state (without citation to any authority) that the filing of the Amended Complaint tolled the Statute of Limitations. This is a misstatement of the law. If there was never any jurisdiction over Petitioners, as Petitioners contend, the Statute of Limitations would continue to run. And Idaho, like many other states, does not have a savings statute.

- argue that the Ninth Circuit did not abuse its discretion in determining that it was just and practicable to retroactively apply Bankruptcy Rule 7004(f) even though by doing so, it effectively sanctioned the violation of Petitioners' due process rights by resurrecting claims that would otherwise be time barred under the applicable Statutes of Limitations.

And, in a desperate attempt to make this end run around the substance of the Petition more palatable, Respondents repeatedly and erroneously accuse Petitioners of misleading the Court (as to matters wholly collateral to the central issue to be decided herein) without a single cite to the record to corroborate their vexatious claims.[2] As set forth in greater detail below, each of Respondents' arguments are unavailing and the Petition must be granted.

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[2] Indeed, from the beginning of the opposition brief (pp. 2-3), Respondents cast Petitioners as "foreign investors with a prior track record of engaging in speculative investments for the primary purpose of enriching themselves at the expense of others," and carelessly state that they "seized control of Gulf . . . an insolvent natural resources company" and "bled Gulf dry." What this invective ignores is that at the time of the acquisition, Gulf's SEC filings affirmatively represented to the investing public that it was solvent and its shares were trading on the New York Stock Exchange at prices ranging from $9-14 per share. Far from looting the company, Petitioners invested $41 million of their funds to acquire their shares. Moreover, Respondents fail to disclose that, at the time that the shares were acquired, Petitioners signed a standstill agreement ensuring that not less than fifty percent of the members of Gulf's Board of Directors would be independent directors and that all of the decisions called into question below were made not just by Petitioners but by the independent directors of Gulf as well. And, the standstill agreement further provided that Gulf could not enter into any transaction or maintain any business relationship with any director or officer of Gulf or any security holder who owns more than five percent of Gulf's voting securities without the prior written approval of at least two-thirds of Gulf's Board of Directors.

REPLY TO NEW POINTS RAISED BY RESPONDENTS

A. The Ninth Circuit's Decision Merits Review By This Court

Respondents first claim that although the decision by the Ninth Circuit relied on this Court's decisions in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), "Petitioners fail to allege that either of these precedents was in any way wrongly decided" (Opp. Brief, p. 10). Respondents further attack Petitioners for allegedly failing to "point . . . to [any] other federal court decision that analyzes similar issues and reaches a different result" (Opp. Brief, p. 11). In making these statements, Respondents disingenuously ignore the over 2 pages of discussion in the Petition as to why *Landgraf* and *McGee* are distinguishable from the present case (*see* Petition, pp. 21-23) and the discussion of the applicability of the Ninth Circuit's own precedent in *Chenault v. United States Postal Service*, 37 F.3d 535, 539 (9th Cir. 1994) (Petition, pp. 19, 20 and 22) in which the Ninth Circuit refused to apply a new limitations period to actions taken prior to the enactment of the new statute, as such application would revive a claim that otherwise could not have been brought.

Supreme Court Rule 10, which "indicate[s] the character of the reasons the Court considers" in determining whether to grant a petition for writ of certiorari provides in subparagraph "c" as follows:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

There can be no serious doubt that the present case falls squarely within Supreme Court Rule 10(c). In retroactively applying Bankruptcy Rule 7004(f) to an adversary proceeding

to confer jurisdiction where the claims would otherwise have been time barred, the Ninth Circuit effectively lengthened the applicable Statutes of Limitations for those claims, adversely impacting upon Petitioners' due process rights, an important federal right. Because Bankruptcy Rule 7004(f) is relatively new, the important federal question of whether this federal rule can be retroactively applied in derogation of Petitioners' federal due process rights has not been, but should be settled by this Court.

Moreover, the Ninth Circuit's decision is inconsistent with *Landgraf*. In rendering its decision, the Ninth Circuit failed to heed this Court's cautioning language that "the mere fact that a new rule is procedural does not mean that it applies to every pending case," and further ignored this Court's stated preference for "the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case," and that "concerns about retroactivity" apply "to procedural rules." *Landgraf*, *supra* at 275 n.29. Had the Ninth Circuit followed this Court's methodology in *Landgraf*, or its own precedent in *Chenault*, the result would have been completely different and Petitioners' due process rights protected.

B. There Is No Basis For Personal Jurisdiction Over Petitioners Other Than Revised Bankruptcy Rule 7004, The Application Of Which Violates Petitioners' Due Process Rights

In another effort to distract this Court from determining whether Petitioners' due process rights have been impaired, Respondents claim without any support whatsoever that they gave the Ninth Circuit "no fewer than three separate grounds upon which the decisions of the Bankruptcy Court and the District Court could be affirmed" and that at Respondents' "urging, the Court of Appeals embraced the least complicated of the three theories (without addressing the others) and found Petitioners subject to the jurisdiction of the Bankruptcy Court

under federal law (as opposed to under the Idaho long-arm statue [sic])" (Opp. Brief, p. 11). Putting aside Respondents' self-proclaimed partnership with the Court of Appeals, there is nothing in the Ninth Circuit's decision that indicated that it agreed with the lower court's application of the Idaho long-arm statute or the conspiracy theory of jurisdiction to Petitioners herein. In fact, the only objective manifestations of the Ninth Court's thinking lead to the opposite conclusion.

The Ninth Circuit granted Petitioners leave to appeal from the District Court's decision, indicating an intent to review that decision (and that of the Bankruptcy Court as well). Moreover, in its decision, the Ninth Circuit did not in any way address the propriety of or rely in any way on the lower courts' application of the Idaho long-arm statute and conspiracy theory of jurisdiction to find that personal jurisdiction had been stated against Petitioners. And, there was ample basis for the Ninth Circuit to refuse to apply these state based theories to the present case. Both sides thoroughly briefed these jurisdictional theories before the Court of Appeals and the Court of Appeals elected not to rely on these theories as a basis for finding jurisdiction.

In *Barr v. Matteo*, 335 U.S. 171 (1957), the case cited by Respondents in support of a denial of *certiorari* herein, the District Court ruled on petitioner's qualified privilege defense in a defamation suit, but the Court of Appeals refused to pass on such defense, on the grounds that petitioner had waived the defense by not addressing it in his initial brief to that court. This Court refused to grant *certiorari*, but remanded the case back to the Court of Appeals for consideration of the qualified privilege defense.

In the present case, no such waiver has taken place. The parties have fully briefed the issues relating to jurisdiction and such issues were before the Ninth Circuit. The Court of Appeals elected not to address the application of the Idaho long arm statute and/or the conspiracy theory of personal

jurisdiction to Petitioners. Thus, even assuming *arguendo* that Respondents are correct, under *Barr*, this Court should remand the case to the Ninth Circuit directing it to pass on the state theories of jurisdiction.

C. There Are No Facts For This Court To Review

In what can only be characterized as a throw-away argument, Respondents next contend that "the Court of Appeals based its finding on factual conclusions drawn by the Bankruptcy Court (and confirmed by the District Court) after its initial review of the Complaint and the various affidavits filed in this action" (Opp. Brief, p. 13).

Respondents well know that these issues were raised by Petitioners' motion to dismiss for lack of personal jurisdiction. On a motion to dismiss, all allegations in the complaint are deemed to be true. Thus, no findings of fact have been made and there are none to be reviewed.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

Lawrence A. Blatte
Counsel of Record
James K. Landau
ROSEN & READE, LLP
757 Third Avenue
New York, New York 10017
(212) 303-9000

Counsel for Petitioners
David J. Rowland, Jeremy E. James, David L. Hudd and Derek J. Moran